TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 282

THE MICHIGAN PUBLIC UTILITIES COMMISSION, RALPH DUFF, WILLIAM W. POTTER, ET AL., ETC., ET AL., APPELLANTS,

vs.

UORAL W. DUKE, DOING BUSINESS AS DUKE CARTAGE COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

FILED FEBRUARY 11, 1935

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INDEX

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[fol. 1]

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity

CORAL W. DUKE, Doing Business as Duke Cartage Company, a Citizen of the State of Michigan, Plaintiff,

vs.

MICHIGAN PUBLIC UTILITIES COMMISSION, RALPH DUFF, WILLIAM W. POTTER, Sherman T. Handy, Samuel O'Dell, and Samuel De Witt Pepper, Members of said Michigan Public Utilities Commission, and Andrew B. Dougherty, Attorney-General of the State of Michigan; Paul W. Voorhies, Prosecuting Attorney of Wayne County, Mich., and Clayton C. Golden, Prosecuting Attorney of Monroe County, Michigan; Roy L. Vandercook, Commanding Officer of the Michigan State Police, and Otto R. Gearhart, a Member of the Michigan State Police, Defendants.

BILL OF COMPLAINT

To the Honorable Judges of the District Court of the United States for the Eastern District of Michigan, in Equity:

1. The Plaintiff, Coral W. Duke, doing business under the trade name of Duke Cartage Company, is a citizen and resident of the State of Michigan, and is engaged in interstate commerce transporting freight in interstate commerce between points in the State of Michigan and points in the State of Ohio and vice versa. The Plaintiff's principal place of business is at Detroit, Michigan, and operates his vehicles in part upon the highways of Michigan, as the same lie partly in the Counties of Wayne and Monroe, in said State.

[fol. 2] 2. That plaintiff engages in no intra-state business, its transactions in the State of Michigan in transporting freight being each and all of them part and parcel and inseparably connected with its business aforesaid, to-wit, the business of interstate commerce.

3. That the Defendant, Michigan Public Utilities Commission is a commission created under and by virtue of Act No. 419 of the Public Acts of the State of Michigan of 1919, which said Act was entitled—

"An Act to provide for the regulation and control of certain public utilities operated within this State; to create a Public Utilities Commission and to define the powers and duties thereof; to abolish the Michigan Railroad Commission and to confer the powers and duties

theerof on the commission hereby created; to provide for the transfer and completion of matters and proceedings now pending before said Railroad Commission; and to prescribe penalties for violations of the provisions hereof."

Reference to said act is hereby made.

4. That said Michigan Public Utilities Commission (hereinafter referred to as "Utilities Commission") superceded the Michigan Railroad Commission which was heretofore created by Act No. 300 of the Public Acts of Michigan of 1909, entitled—

"An Act to define and regulate common carriers and the receiving, transportation and delivery of persons and property, prevent the imposition of unreasonable rates, prevent unjust discrimination, insure adequate service, create the Michigan Railroad Commission, define the powers and duties thereof, and to prescribe penalties for violations hereof."

to which said Act reference is hereto had as fully as if the same were set forth herein at length.

5. That Defendants Ralph Duff, William W. Potter, Sherman T. Handy, Samuel O'Dell and Samuel DeWitt Pepper, are all the duly appointed, qualified and acting members of said Michigan Public [fol. 3] Utilities Commission.

6. That said Defendant Ralph Duff is a citizen of the State of Michigan and resides in Bad Axe, Eastern District of Michigan.

7. That Defendant William W. Potter is a citizen of the State of Michigan and resides in Hastings, Western District of Michigan.

8. That Defendant Sherman T. Handy is a citizen of the State of Michigan and resides in Lansing, Eastern District of Michigan.

9. That Defendant Samuel O'Dell is a citizen of the State of Michigan and resides in Shelby, Western District of Michigan.

10. That Defendant Samuel DeWitt Pepper is a citizen of the State of Michigan and resides in Port Huron, Eastern District of Michigan.

11. That Defendant Andrew B. Dougherty, is duly appointed, qualified and acting Attorney General of the State of Michigan, and is a citizen of the State of Michigan, and resides at Lansing, Eastern District of Michigan.

12. That Defendant, Paul W. Voorhies, is Prosecuting Attorney of Wayne County, Michigan, a citizen of the State of Michigan, and a resident of the City of Detroit, Eastern District of Michigan.

13. That Defendant, Clayton C. Golden, is Prosecuting Attorney of Monroe County, Michigan, a citizen of the State of Michigan, and a resident of the City of Monroe, Eastern District of Michigan.

14. That Defendant, Roy L. Vandercook, is a citizen of the State of Michigan, residing at Lansing, Eastern District of Michigan, and [fol. 4] is Commanding Officer of the Michigan State Police, which said Michigan State Police was created by Act No. 26 of the Public Acts of Michigan of 1919, to which reference is hereby made, the office powers and duties of such Police having heretofore been transferred to the State Department of Public Safety pursuant to Act No. 123 of the Public Acts of Michigan of the year 1921, to which reference is made. That under and by virtue of Section 5 of said Act No. 26 of the Public Acts of Michigan of 1919, it is provided:

"The several officers and members of the force shall have and exercise all the powers of deputy sheriffs in the execution of the criminal laws of the State and of all laws for the discovery and prevention of crime and shall have authority to make arrests without warrants for all violations of the law committed in their presence including laws designed for the protection of the public in the use of the highways of the State, and to serve and execute all criminal process. It shall be the duty of the State police force and all other officers and members thereof to co-operate with other State authorities and with local authorities in detecting crime, apprehending criminals, and preserving law and order throughout the State."

15. That Defendant, Otto R. Gearhart, is a citizen of the State of Michigan and resides at South Rockwood within the Eastern District of Michigan, and is a member of the aforesaid Michigan State Police, which said Michigan State Police constitutes a class so numerous as to make it impracticable to bring them all before the Court. That said Defendant is a representative of said class, and that the questions involved herein are of common and general interest to all of the persons constituting said class.

16. That this is a suit of civil nature in equity and arises under the Constitution and Laws of the United States.

[fol. 5] 17. That the matter in controversy herein exceeds, exclusive of interest and costs, the sum and value of $3,000.00.

18. That plaintiff has been engaged in said business for upwards of six years and now has an investment in vehicles and equipment, land and buildings necessary to the operation thereof of $200,000.00, and employs seventy five (75) men and operates forty seven (47) trucks and trailers, in the conduct of said business.

19. That plaintiff- sole and entire business consists in the carriage of freight as aforesaid in interstate commerce by virtue of three certain special contracts with three manufacturers of automobile bodies at Detroit, Michigan, and that he transports automobile bodies only and transacts no business for any one else or for the public, and does not hold himself out as transacting the business aforesaid of transportation of automobile bodies generally for the public.

20. That at the 52nd regular session of the Michigan State Legislature there was passed a certain Act known as Act No. 209 of the

Public Acts of Michigan of 1923, which said Act including the title thereof is as follows:

"An act to regulate and define common carriers of persons and property by motor vehicle on public highways of this State, prescribing the payment and fixing the amount of privilege taxes for such carriers, the disposition of such taxes and prescribing penalties for violation of this act.

The People of the State of Michigan enact:

Section 1. After thirty days from the effective date of this act, no person, firm or corporation shall engage or continue in the business of transportating persons or property, by motor vehicle for hire, upon or over the public highways of this State, over fixed routes or between fixed termini, or hold themselves out to the public as being engaged in such business, unless and until they shall have obtained from the Michigan Public Utilities Commission a permit so to do, which said permit shall be issued in accordance with the public convenience and necessity and shall not be assign-
[fol. 6] able; Provided, That this act shall not apply to carriers operating exclusively within cities or villages.

Section 2. Said commission shall, by general order, prescribe such rules and regulations as shall, by it, be deemed appropriate under this act. Said commission may withhold such permit in whole or in part, when it appears to the commission that the applicant is not or will not be able to furnish adequate, safe or convenient service to the public, but not without just cause.

Section 3. Any and all persons, firms or corporations, now engaged, or which shall hereafter engage, in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this State, or any of them, as above described, shall be common carriers, and, so far as applicable, all laws of this State now in force or hereafter enacted, regulating the transportation of persons or property by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers of persons and property by motor vehicle upon or over the public highways of this State as above provided.

Section 4. Such permit, when granted, shall specify the route or routes over which the person, firm or corporation to whom the same may be granted shall have a right to operate, and may cover the whole or any part of the route or routes applied for. Any law or laws now in force or hereafter enacted, regulating the practice before said commission, or the method of reviewing its order, shall apply with equal force and effect to proceedings had or taken before said commission under this act.

Section 5. "Fixed routes, or between fixed termini," as used herein, or any permit hereunder, shall mean the route or termini over or between which said carrier shall usually or ordinarily operate such motor vehicle, though departures from such route or termini

may be periodical or irregular. Whether such motor vehicle is operated over fixed routes or between fixed termini, shall be a question of fact, and the commission's finding thereon shall be final.

Section 6. Said commission may, after notice given and hearing granted to any person, firm or corporation to whom a permit may have been granted, suspend or revoke the same for a violation of this act or of any lawful order, rule or regulation of said commission.

Section 7. Any and all common carriers under this act shall carry insurance for the protection of the persons and property carried by them in such amount as shall be ordered by said commission, and in insurers approved by the Commissioner of Insurance of this State, or shall furnish an indemnity bond running to the people of the State of Michigan, conditioned upon the payment of all just claims and liabilities resulting from injury to persons or property carried by such carrier, and in a company authorized to do business in this State, in an amount to be fixed and approved by said Commission.

[fol. 7] Section 8. Such permit shall entitle the carrier to whom it is issued to transport persons or property or both, over the route or routes and between the termini indicated on the face of such permit. Every such carrier shall pay to the commission for the use of the State, or at or prior to the issuance of the permit, and as a fee for the privilege of engaging in the business defined in section one hereof, for one year, a sum of money to be computed as follows: One dollar for each one hundred pounds weight of each motor vehicle employed by it in such business; and shall thereafter pay at a similar rate for each one hundred pounds weight of each motor vehicle added or acquired during any license year, which fees shall be in addition to any motor vehicle tax prescribed by the general motor vehicle law of the State. Each permit shall be good for a period of one year from its date, and at the expiration thereof may be renewed by the commission upon like terms and conditions from year to year thereafter. All fees received hereunder shall be paid into the State Treasury, and are hereby appropriated to the general highway fund of the State for highway purposes. Nothing in this section shall be construed to interfere with the right of any city or village to the reasonable control, by general regulation, (applicable to all motor vehicles), of its streets, alleys and public places, or to authorize a carrier to do a local business without the consent of the municipality in which such local business is wholly carried on.

Section 9. Any person, firm or corporation violating any of the provisions of this act, or any lawful order, rule or regulation of said commission, shall be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail not over ninety days, or both such fine and imprisonment in the discretion of the court; and if a corporation, its corporate officers, having the management of the business of such carrier, shall be personally subject to a fine not exceeding one hundred dollars or imprisonment in the county

jail not more than 90 days, or both such fine and imprisonment in the discretion of the court.

Section 10. Said commission may use any and all available legal and equitable remedies of a civil nature to enforce the provisions of this act, or any lawful order, rule or regulation made in pursuance hereof.

Section 11. Each section of this act shall be independently operative, and if any of said sections shall be declared invalid by any court of competent jurisdiction, it shall not affect or invalidate the remainder of this act.

This act is ordered to take immediate effect. Approved May 23, 1923."

21. That said Defendants, Michigan Public Utilities Commission and the aforesaid members thereof have threatened and as Plaintiff is informed and verily believes are about to attempt to enforce said [fol. 8] Act, and all of the provisions thereof, against Plaintiffs and their aforesaid motor trucks and trailers used in the aforesaid interstate transportation business of said Plaintiff, Duke Cartage Company, and are about to stop the vehicles of plaintiff on the highway from Detroit to Toledo by means of local officers and members of the aforesaid State Police stationed in, and near villages on the route aforesaid.

22. That under Section 41 of said Act 300 of the Public Acts of Michigan of 1909, the said Utilities Commission, together with the Attorney General of the State of Michigan and any Prosecuting Attorney selected by said Commission in any county where action is pending, is required to inquire into and to prosecute for any neglect or violation of the laws of the State of Michigan by any common carrier, subject to said act.

23. That, acting under and by authority of said Act 209, said Utilities Commission has promulgated a set of rules and instructions, a copy of which rules and regulations are hereto attached as Exhibit 1. That said Commission, by written instructions, is requiring all carriers seeking permits under said act to "Give a list of the steam railroads, electric railways and names and addresses of all other motor vehicles. This list should include all regular transportation lines operating between same points." That said instructions provide further "If the existing transportation companies do not give frequent service, or they make very indirect connections, or the present transportation facilities are not sufficient to care for the business, or if applicant has purchased interests of parties previ- [fol. 9] ously operating between same points, such facts or similar facts should be stated" as reasons. The foregoing appears as instructions for showing reasons why applications should be granted.

24. That Plaintiffs have been informed through the public press that said Utilities Commission has announced that the Michigan

State Police will be called upon to enforce the provisions of said Act 209 of the Public Acts of Michigan of 1923; and employees of Plaintiff have lately been warned by officers stationed in villages on the route of Plaintiff's vehicles, that they would forcibly stop and interrupt the progress of said vehicles through said municipalities on Sept. 29th 1923, because of any by virtue of orders received from the aforesaid Michigan Public Utilities Commission, and its officers and agents.

25. Said Plaintiffs verily believe from said announcements that it is the intention of said Commission, through said State Police, to arrest drivers of Plaintiffs' trucks and to stop the transportation of said freights aforesaid, unless Plaintiffs comply with all of the provisions of said Act 209.

26. That said Commission is at present attempting to enforce the provisions of said Act 209 against all common carriers of persons and property by motor vehicle (as defined by said act) and is holding hearing under said act, at which said hearings various railroad and electric railway interests are appearing in contest of applications by motor vehicle owners or license thereunder. That said interests are claiming the right to prevent the issuance of licenses, (as plaintiffs are informed and believe), on the ground that the railroads and electric railways are furnishing adequate and sufficient service, [fol. 10] thereby claiming that no public convenience or necessity for additional service exists under said act.

27. Plaintiffs allege that said Act 209 of the Public Acts of Michigan of 1923 is void, invalid and unconstitutional as to plaintiff for the following reasons:

(a) It places an undue, unwarranted and illegal burden and regulation upon the interstate commerce in which Plaintiff is engaged, contrary to the Constitution and laws of the United States.

(b) It is in conflict with the rights conferred upon Congress to regulate commerce among the several states as provided in Section 8, Clause (3) Article I of the Constitution of the United States. (The so-called Commerce Clause).

(c) It deprives Plaintiff of, and is in conflict with, their rights under said so-called Commerce Clause of the Constitution of the United States.

(d) It deprives Plaintiff of privileges and immunities contrary to Section 2, Article IV of the Constitution of the United States.

(e) It is an attempt to enforce a law of the State of Michigan abridging the privileges and immunities of the Plaintiff as a citizen of the United States, contrary to Amendment XIV to the Constitution of the United States.

(f) It denies to Plaintiff, the equal protection of the laws guaranteed by Amendment XIV to the Constitution of the United States

and Section 1 of Article IV of the 1908 Constitution of the State of Michigan.

(g) It is retrospective and a law impairing the obligation of contracts, contrary to Section 10 of Article I of the Constitution of [fol. 11] the United States and of Section 9 of Article II of the 1908 Constitution of the State of Michigan.

(h) It deprives Plaintiffs, and each of them, of their property without due process of law, contrary to Amendment XIV to the Constitution of the United States.

(i) As a law, it embraces more than one object and does not express such objects in its title, contrary to Section 21, Article V of the 1908 Constitution of the State of Michigan. The object of said act is not expressed in its title as required by Section 21 Article V of the 1908 Constitution of the State of Michigan.

(j) It attempts to revise, alter and amend other statutes of the State of Michigan by reference to their title only, (including statutes and laws hereafter to be enacted), contrary to Section 21 of Article V of the 1908 Constitution of the State of Michigan.

(k) It attempts to revise other acts and to alter and amend sections thereof without re-enacting and publishing such acts revised and sections altered and amended at length, as required by Section 21 of Article V of the 1908 Constitution of the State of Michigan.

(l) Not being an act immediately necessary for the preservation of the public peace, health or safety, it was given immediate effect, contrary to the provisions of Section 21 of Article V of the 1908 Constitution of the State of Michigan.

(m) It deprives Plaintiffs, and each of them, of their property without due process of law, contrary to Section 16 of Article II of the 1908 Constitution of the State of Michigan.

[fol. 12] (n) It is so indefinite, uncertain and imperfect, as to be incapable of enforcement.

(o) It confers upon an administrative commission legislative powers, contrary to Article V of the 1908 Constitution of the State of Michigan.

(p) It confers judicial power upon an administrative commission, contrary to Section 2, Article IV of the 1908 Constitution of the State of Michigan.

(q) It is arbitrary and discriminatory in its application to persons of the same class.

(r) It deprives Plaintiffs, and each of them, of their right to trial by jury, contrary to Amendment VII to the Constitution of the United States, and Section 13 of Article II of the 1908 Constitution of the State of Michigan.

(s) It is illegal class legislation.

(t) It imposes a specific tax which is not uniform upon the classes upon which said tax operates, contrary to Section 4, Article X of the 1908 Constitution of the State of Michigan.

(u) It permits, aids in and tends to the creation of monopolies, contrary to the laws of the State of Michigan and of the United States.

(v) It is contrary to the rights of the Plaintiffs, and each of them, arising from the expenditure of the so-called Federal Aid Money in the improvement of highways within the State of Michigan and particularly the highways over which plaintiffs operate.

(w) It is contrary to the rights of Plaintiffs, and each of them, to operate their motor vehicles over the highways of the State of Michigan, in their said business, pursuant to the so-called Motor [fol. 13] Vehicle Law of the State of Michigan.

(x) That it is grossly unreasonable, insofar as it attempts to include and designate as common carriers, any person who or any corporation which carries one article of freight only for one person or corporation only, under a special contract therefor.

28. In partial and further implification of divisions (a), (b) and (c) of paragraph 27 of our bill, Plaintiff alleges:

I. That said Act No. 209 imposes upon the interstate commerce and business of Plaintiff direct burdens, regulations and restrictions which the State of Michigan has no lawful right to impose and likewise unlawfully subjects the said business to the positive control, regulation and restruction of the said State and an administrative commission thereof.

II. That said Act No. 209 unlawfully gives said Utilities Commission the right entirely or partially to prevent Plaintiff from conducting their said interstate business whether Plaintiff pays said tax or not, and unlawfully confers upon said Commission the blanket and general right to prescribe any and all such rules and regulations governing Plaintiff's business as may be deemed appropriate by said Commission (including the right to determine what routes shall be used and the right to revoke any permit granted for violation of said Act or any lawful order, rule or regulation of said Commission); said Act further (by general, indefinite and uncertain reference) making all laws of the State of Michigan now in force or hereafter enacted regulating the transportation of persons or property by any other common carrier, including regulation of rates automatically applicable to Plaintiffs and their said business without regard to the effect said laws, rules or regulations have or will have on Plaintiffs under the Constitution and laws of the United States. That the result of the foregoing is that the constitutional right of Plaintiffs to engage in interstate commerce is unlawfully made dependent upon the action of said Commission and upon other unlawful, uncertain and unreasonable contingencies, and subject to unlawful, uncertain

and unreasonable control, regulation and restriction by the State of Michigan and the said Utilities Commission.

[fol. 14] III. Said Act unlawfully requires Plaintiff to carry insurance for the protection of persons and property carried by them in such amount as shall be ordered by said Commission and in insurers approved by the Commission of Insurance or to furnish an indemnity bond running to the People of the State of Michigan conditioned upon the payment of all just claims and liabilities resulting from injury to persons or property carried and in a company authorized to do business in Michigan in an amount to be fixed and approved by said Commission. That this specific provision imposes an unlawful, arbitrary, unwarranted and cumbersome and unnecessary burden upon Plaintiff's interstate business and is one which the State of Michigan has no right to impose thereon. That the imposition of such burden is contrary to the rights of Plaintiff under said Commerce Clause of the Constitution of the United States.

IV. Said Act unlawfully requires the payment of a certain tax or fee which is a direct tax upon the privilege of engaging in Plaintiff's interstate business and a direct burden and charge thereon, rendering such tax and fee void.

V. The provisions of said Act subjecting Plaintiff to criminal punishment for, and giving said Commission the right to use all available legal and equitable remedies of a civil nature to enforce compliance with, said Act and any lawful rule or regulation of said Commission, are likewise unlawful direct burdens and charges on the interstate business of said Plaintiffs.

VI. The provisions of said Act, making the determination of the Commission final as to whether a motor vehicle is operated over fixed routes or between fixed termini, is an unlawful and burdensome charge on Plaintiff's interstate business.

29. In partial and further amplification of divisions (d), (e) and (f) of said paragraph 27 hereof, Plaintiff alleges:

That plaintiff has the constitutional right to engage in their said business without compliance with said Act 209 and that said Act deprives them of their said constitutional rights and abridges their constitutional privileges and denies them the equal protection of the laws guaranteed by Amendment XIV to the Constitution of the United States and the Constitution of Michigan.

30. In partial and further amplification of division (g) of paragraph 27 hereof, Plaintiff alleges:

That said Act, if enforced, will operate to destroy the lawful business of Plaintiff, established and contracted for prior to the enactment of said Act, and to jeopardize and restrict their rights to engage in said business heretofore lawfully conducted. Said Act will impair the obligation of the contract between Plaintiff and of the contracts [fol. 15] and agreements between Plaintiff, Duke Cartage Company,

and the three certain manufacturers hereinbefore referred to and will cause Plaintiff unavoidably to break said contracts.

31. In partial and further amplification of divisions (h) and (m) of paragraph 27 hereof, Plaintiff alleges:

That said Act will destroy Plaintiff's business and will result in great depreciation in the value thereof, thereby preventing Plaintiff from enjoying the same. That the foregoing will be accomplished by virtue of the enforcement of said Act and will not be by due process of law.

The Plaintiff, Duke Cartage Company, alleges that under said law it will be compelled to pay in excess of $5,000.00 per year for the so-called privilege tax; that such tax is unjust, unreasonable and confiscatory and the exaction of the same amounts to a taking of property of said plaintiff without due process of law, and deprives it of its rights, privileges and immunities, and denies it the equal protection of the law all contrary to the Constitution of the United States and of the State of Michigan. Plaintiff alleges that said tax is many times in excess of a proper privilege tax.

32. In partial and further amplification of division (i) of paragraph 27, Plaintiff alleges:

That said Act gives said Commission, among others, the following powers:

a. To prescribe rules and regulations deemed appropriate by it.

b. To grant or withhold in whole or in part, the license to operate.

c. To exercise the same powers over common carriers of persons and property by motor vehicle as may be exercised by the Commission under other laws of the State of Michigan, including the regulation of rates.

d. To make final determination of questions of fact, under Section 5 of said Act, and to determine as a result thereof, whether a given carrier comes within the provisions of said Act.

e. To grant or withhold, suspend or revoke, any permit.

f. To require, and pass upon the amount of, insurance or bonds, pursuant to paragraph 7 of said Act.

g. To indicate routes.

h. To enforce orders, rules and regulations by all available legal and equitable remedies of a civil nature.

That the conferring upon said Commission of these powers was such an object as was required by the Constitution of the State of Michigan to be expressed in the title of said Act, and not being so expressed renders said Act null and void.

That said Act had the conferring of said powers as an object, in

addition to the objects expressed in said Act, therefore said Act is void because embracing more than one object, contrary to the constitution of State of Michigan.

[fol. 16] That said act has among other things, the following specific objects: A—Regulation; B—Prohibition; and C—Taxation; which constitute such a plurality of objects as to violate Section 21, Article V of the Constitution of the State of Michigan. That the object of prohibition is not stated in the title of said act as required by said constitutional provision. That the tax required to be paid by the act is not a privilege tax as contemplated by the title and the exaction of the tax so provided is therefore an object not expressed in the title as required by said constitutional provision.

33. In partial and further amplification of divisions (j) and (k) of paragraph 27, Plaintiff alleges:

I. That outside of said Act 209 there is no power in the said Commission to take jurisdiction or control over common carriers of persons or property by motor vehicle and that the effect of said Act 209 is to revise, alter and amend other statutes of the State of Michigan, relating to common carriers and to said Utilities Commission, by reference to their general title only, and also to amend, in the same manner, any future law hereafter enacted regulating the transportation of persons or property by other common carriers, regardless of whether said future laws, when enacted, provide for regulation over Common carriers of persons or property by motor vehicle.

II. That the foregoing likewise amounts to an attempt to revise other acts and to alter and amend sections thereof, without re-enacting and publishing such acts revised and sections altered and amended at length, as required by the constitution of the State of Michigan.

III. That all of the foregoing renders said Act null and void.

34. In partial and further amplification of division (l) of paragraph 27 hereof, Plaintiff alleges:

That there did not exist the basis for the right of the Legislature to give said Act immediate effect.

35. In partial and further amplification of divisions (h), (m), (n) and (o) of paragraph 27 hereof, the Plaintiff alleges:

I. That said Act fails to provide any reasonable limits of or basis for the regulation and powers conferred upon said Commission, and that it is impossible for Plaintiffs, or any one else, to know or to ascertain what they are required to do under said Act. That there are numerous other common carriers of persons and property, concerning which various laws are now in force, or concerning [fol. 17] which various laws in the future undoubtedly will be enacted. That among such carriers are steam railroads, electric railways, boats and express companies. That there are many hundreds of regulations and laws in force regulating such carriers, respectively, and many different bases for, and limits on, their rights

and privileges and the control and regulation of said Utilities Commission thereof. That said Act fails to prescribe the rights of Plaintiffs, or their duty, under such laws. Said Act further fails to designate, with any reasonable certainty, which of said laws are applicable to Plaintiff.

II. That said Act unlawfully permits said Commission to determine what laws Plaintiff shall be subject to.

III. That said Act, being so uncertain and indefinite, virtually leaves it to said Commisson to legislate in the premises, without any reasonable basis for, or control over, the action of said commission.

36. In partial and further amplification of divisions (p) and (r) of paragraph 27 hereof, Plaintiff alleges:

I. That said Act, under Section 5, makes the finding of the Commission final on the question of whether a carrier is operating over fixed routes or between fixd termini. The effect of this provision is to make th determinaton of the Commission final as to whether or not Plaintiff is subject to said Act.

II. That no right of review is given, and, therefore, Plaintiff is deprived of his constitutional right to a trial by jury in the premises.

37. In partial and further amplification of divisions (q), (s) and (t) of paragraph 27 hereof, the Plaintiff alleges:

1. That operating over the highways of the State of Michigan are many thousands of motor vehicles transporting persons and property for hire. That some of these vehicles operate wholly within the State of Michigan and others operate between points in the State of Michigan and other states. That many of said vehicles operate generally over the highways of the State without falling into the classification of those operating over fixed routes, or between fixed termini, as defined in the said Act. That a great number of owners of such vehicles engage in the general transportation of persons or property for conveyance to various places, without having fixed termini or operating over a fixed route, holding themselves out to convey to different sections of the State or to different points generally. That the classification of such vehicles made subject to said Act, discriminates against Plaintiff and others so similarly sit- [fol. 18] uated and against those required to comply therewith, but in favor of a far greater number of persons who should likewise be made subject to said Act, if said Act is to be enforced. That such other persons include those conducting a general business of transporting persons or property generally, but not over fixed routes or between fixed termini, those owning and operating motor vehicles in connection with other businesses, as, for example, manufacturers, creameries, bakeries, oil companies and the like, who daily use the highways of this state for the constant and regular transportation of heir products and those furnishing taxi and jitney service generally, but not over fixed routes or between fixed termini. That said tax or

fee prescribed by said Act is not a fee for use of the highways, but, if it should be so construed, is, nevertheless, a specific tax which is not uniform upon the classes upon which it operates, nor is it imposed upon all of the persons who should properly and fairly be likewise taxed, thereby resulting in discrimination against those required to pay the same under said Act. That if there is any basis for said tax, it should be required to be paid by many of the other persons heretofore mentioned, and not being so required, renders such tax unjust, discriminatory and illegal.

38. In partial and further amplification of division (u) of paragraph 27 hereof, Plaintiff alleges:

The power given by said Act to withhold in whole or in part, the permit, or to grant same in accordance with public convenience and necessity, confers upon said Commission the right and duty to create and to permit monopolies in the business of transporting persons or property by motor vehicle. That said Act unlawfully gives said Commission broad powers to withhold said permit (even if the tax be paid) in whole or in part, or to revoke same after granted, in the event others are willing or able to furnish facilities for transportation, or in the event it is inconvenient to the public to grant or continue such permit. All of which is contrary to the settled, fixed and public policy and laws of the State of Michigan and to the statutes of the United States prohibiting monopolies and restraint of trade on interstate commerce.

39. In partial and further amplification of division (v) of paragraph 27 hereof, Plaintiff alleges:

I. That there has been expended on the so-called Dixie Highway, south of Flat Rock, a large sum of money (which Plaintiff is informed is $125,000) furnished as Federal Aid for said highway, and on the so-called Dearborn-Flat Rock road $284,000 of such money.

II. That said Plaintiff is operating over said Dixie Highway and as soon as said Flat Rock road is completed, intend to operate thereover.

[fol. 19] III. That the Federal government has aided the State of Michigan in the construction of various highways throughout the state to the extent of, as Plaintiff is informed, over $1,000,000.

IV. That in accepting said Federal Aid, said State of Michigan is precluded from debar-ing citizens and residents of other states, or citizens of this state, and particularly the Plaintiff, from the use of such highway, for the carrying on of interstate commerce, and from requiring the Plaintiff to comply with said Act 209.

V. That said Dixie Highway and other highways over which Plaintiff is operating, are main trunk lines and of primary and interstate character, connecting with important interstate highways of other states. That said Federal Aid has been accepted by the State of Michigan under the Rural Post Roads Acts of July 11,

1916 and February 28, 1919 and the Federal Highway Act of November 9, 1921 (to which reference is made). That under said Acts the State of Michigan is estopped and prevented from enforcing said Act 209 against Plaintiff.

VI. That under said Federal Acts the State of Michigan is precluded from charging the fee prescribed by said Act 209.

VII. That the State of Michigan is further precluded by said Federal Acts from enforcing said Act 209 as a regulation.

40. In partial and further amplification of division (w) of paragraph 27 hereof, Plaintiff alleges:

1. That Plaintiff has complied with the provisions of the law of the State of Michigan relative to motor vehicles and the operation thereof and conspicuously display (on their said motor equipment) their state license motor vehicle numbers. That by reason of said Act 383 the State of Michigan is precluded from enforcing said Act 209 against Plaintiff and from requiring compliance therewith by Plaintiff as a condition to the right to use the highways of the State of Michigan in Plaintiff's said business.

41. That unless Plaintiff complies with the requirements of said Act 209, he will be prevented from engaging in his said interstate business and will be deprived from the benefits and income thereof. That the aforesaid rights of said Plaintiff exceeds in value the sum of $3,000.00, exclusive of interest and costs, and that if said Plaintiff, Duke Cartage Company, is required to comply with the provisions of said Act, he will be compelled to expend and pay, for [fol. 20] the so-called privilege tax and insurance, in excess of $3,000.00 exclusive of interest and costs.

42. That the enforcement of said Act will result in a great number of prosecutions and proceedings against the Plaintiff, and that only by this proceeding, and the relief therein prayed, can a multiplicity of suits, actions and proceedings, be avoided. That Plaintiff has no adequate remedy at law in the premises.

Wherefore the Plaintiff prays:

1. That said defendants, and each of them, be required to answer this Bill of Complaint (but not under oath, answer under oath being specifically waived).

2. That said defendants, upon the filing of this bill, and until final hearing, be restrained and enjoined, and after final hearing be permanently enjoined, from attempting to enforce said Act 209 of the Public Acts of Michigan of 1923 in any manner, and particularly against Plaintiff, and from attempting to enforce any penalties, rights and privileges conferred thereunder for non-compliance therewith, and from in any manner molesting or interfering with Plaintiffs, or their equipment used in their said business, or any person employed by them in the prosecution thereof.

3. That the said Act 209 of the Public Acts of Michigan of 1923 *he* declared null and void, illegal and unconstitutional.

4. That the writ of chancery summons or subpœna issue in accordance with the statute and rules and practices of this court.

5. That Plaintiff may have such further and other relief in the premises as equity and good conscience requires and as to the Court shall seem meet.

Duke Cartage Company, by C. W. Duke, Its Duly Authorized President, Plaintiff. Beaumont, Smith & Harris, Attorneys for Plaintiff. Business address: 1121-9 Ford Bldg., Detroit, Michigan.

[fol. 21] Jurat showing the foregoing was duly sworn to by Coral W. Duke omitted in printing.

[fol. 22] EXHIBIT 1 TO BILL OF COMPLAINT

MICHIGAN PUBLIC UTILITIES COMMISSION

Important Notice to Applicants for Motor Vehicles Permits

The Commission has adopted the following rule relating to insurance or indemnity bond to be provided by motor vehicle common carriers. It will be noted that such carriers must be prepared to file with the Commission the certificate of the insurance or bond called for in the rule within ten (10) days after the Commission issues its order authorizing the issuance of the permit. No permit will actually be issued until after the certificate of insurance or bond has been filed with the Commission. It is best, wherever possible, to file such certificate of insurance or bond at the time of making application, thus insuring prompt issuance of the permit.

Insurance or Indemnity Bonds

Section 7 of Act No. 209 of the Public Acts of 1923 provides as follows: "Any and all common carriers under this act shall carry insurance for the protection of the persons and property carried by them in such amount as shall be ordered by said Commission, and in insurers approved by the Commission of Insurance of this State, or shall furnish an indemnity bond running to the people of the State of Michigan, conditioned upon the payment of all just claims and liabilities resulting from injury to persons or property carried by such carrier, and in a company authorized to do business in this State in an amount to be fixed and approved by said Commission."

The Commission construes Act No. 209 of the Public Acts of 1923 to place the same liabilities upon motor vehicle common carriers

as *it not* placed upon all other lawfully defined common carriers. Therefore, all common carriers, as defined in Act No. 209 of the Public Acts of 1923, shall take out and keep in force, in some company legally authorized to do a motor vehicle indemnity insurance or bonding business in this State, a policy, policies or bond running to the people of the State of Michigan in the following amounts:

Passenger Vehicle Liability and Property Damage Insurance or Indemnity Bond

(a) For each passenger vehicle used, the seating capacity of which is twelve (12) passengers or less:

(Insurance)

For any recovery for personal injury by one passenger, Five Thousand Dollars ($5,000.00).

[fol. 23] For any recovery for personal injuries by all passengers in any one accident, not less than Ten Thousand Dollars ($10,000.00).

For any recovery for damage to property of any passenger other than the assured, One Thousand Dollars ($1,000.00).

(Indemnity Bond)

For any recovery for personal injury or damage to property of any and all passengers other than the assured, Eleven Thousand Dollars ($11,000.00).

(b) For each passenger vehicle used, the seating capacity of which is thirteen (13) to twenty (20) passengers, inclusive:

(Insurance)

For any recovery for personal injury by one passenger, Five Thousand Dollars ($5,000.00).

For any recovery for personal injuries by all passengers in any one accident, not less than Fifteen Thousand Dollars ($15,000.00).

For any recovery for damage to property of any passenger other than the assured, One Thousand Dollars ($1,000.00).

(Indemnity Bond)

For any recovery for personal injury or damage to property of any and all passengers other than the assured, Sixteen Thousand Dollars ($16,000.00).

(c) For each passenger vehicle used, the seating capacity of which is twenty-one (21) to thirty (30) passengers, inclusive:

(Insurance)

For any recovery for personal injury by one passenger, Five Thousand Dollars ($5,000.00).

For any recovery for personal injuries by all passengers in any one accident, not less than Twenty Thousand Dollars ($20,000.00).

For any recovery for damage to property of any passenger other than the assured, One Thousand Dollars ($1,000.00).

(Indemnity Bond)

For any recovery for personal injury or damage to property of any and all passengers other than the assured, Twenty-one Thousand Dollars ($21,000.00).

(d) For each passenger vehicle used, the seating capacity of which is more than thirty (30) passengers:

[fol 24] (Insurance)

For any recovery for personal injury by one passenger, Five Thousand Dollars ($5,000.00).

For any recovery for personal injuries by all passengers in any one accident, not less than Twenty-five Thousand Dollars ($25,000.00).

For any recovery for damage to property of any passenger other than the assured, One Thousand Dollars ($1,000.00).

(Indemnity Bond)

For any recovery for personal injury or damage to property of any and all passenger- other than the assured, Twenty-six thousand dollars ($26,000).

Freight Vehicle Liability & Property Damage Insurance or Indemnity Bond

Each such common carrier, doing a freight business, shall take out and keep in force a liability and property damage insurance or indemnity bond in an amount or in such a manner so as to fully cover and protect the value of all property received by it for transportation insofar as said common carrier shall be liable under any and all laws applicable to said carrier.

Said insurance or bond shall be executed within ten (10) days from the date that carrier's permit of Public Convenience and Necessity is authorized.

A certificate issued by the insurance or bonding company shall be immediately filed with the Commission after the execution of said documents, and the certificate shall show:

The name of the person, firm or corporation and address of insured or bonded;

The name of insurance or bonding company;

That said documents cover the obligations imposed upon such person, firm or corporation by Act No. 209 of the Public Acts of 1923 and the regulations adopted by the Commission in matters of this kind;

That said insurance or bonding Company is approved by the Commissioner of Insurance of this State;

The factory number of each and every vehicle covered by said documents;

Date of execution and expiration of said documents;

Signature and official position of the person executing the certificate;

Date and place executed.

The insurance or bonding company shall notify the Commission ten (10) days before any policy, policies or bonds executed in behalf of common carriers defined in Act No. 209 of the Public acts of 1923 are to expire either by way of cancellation or limitation.

[fol. 25] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CORAL W. DUKE—Filed Sept. 29, 1923

Coral W. Duke, Plaintiff in the attached Bill of Complaint, being duly sworn, deposes and says that he owns and operates forty-seven automobile trucks of the make known as Reo, forty-seven specially designed trailers and various equipment connected therewith; that he has purchased land and erected a large and valuable garage thereon for the housing and care of said trucks, trailers and equipment; that he has invested in said property the sum of upwards of Two Hundred Thousand Dollars; that he has and owns contracts with automobile body manufacturers of Detroit, Michigan, giving him the exclusive right and privilege of transporting automobile bodies from the plants of the aforesaid manufacturers at Detroit, Michigan, to the plants of the Willys Overland Company at Toledo, Ohio; that deponent is bound under his contract to transport all of the body output of said factories intended for the Willys Company of Toledo, Ohio, and that said manufacturers depend entirely on deponent and on deponent's equipment for the transportation from Detroit, Michigan to Toledo, Ohio, and said manufacturers have no equipment with which to handle this work; that said contracts are of great value to deponent, to-wit; of the value of upwards of $50,000; that deponent has been informed by an officer of the Michigan State Police stationed at Rockwood, Michigan, that the said Police would on September 29th, 1923, stop and present the vehicles of deponent from further progress on their route from Detroit, Michigan, to Toledo, Ohio, unless the drivers of said vehicles had paid the fees and exhibited the certificates required by Act No. 209 of the P. A. of the State of Michigan, Session of 1923; that to obtain said certificates deponent would be obliged to expend in cash

upwards of $5,000.00; that deponent is threatened with the enforcement of other penalties mentioned in said Act No. 209 of 1923, of the State of Michigan; that the enforcement of said act will cause deponent irreparable injury and will cause the loss of valuable contracts, the ruination of his business and the loss of a substantial part of his capital investment, and

Further sayeth not.

(Sgd.) C. W. Duke.

Subscribed and sworn to before me, this 28th day of September, 1923. Charles H. McIntyre, Notary Public, Wayne County, Michigan. My commission expires Feb. 29, 1924.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Nov. 23, 1923

Now come the defendants and for answer to the bill of complaint filed herein, state as follows:

1 Answering paragraph 1 of plaintiff's bill of complaint, defendants aver that they are not in possession of sufficient information to either admit or deny the material allegations contained in said paragraph.

2. Answering paragraph 2 of plaintiff's bill of complaint, defendants aver that they are not possessed of sufficient information to either admit or deny the material allegations contained in said paragraph.

3. Defendants admit the material allegations contained in paragraph 3 of plaintiff's bill of complaint.

4. Defendants admit the material allegations contained in paragraph 4 of plaintiff's bill of complaint.

5. Defendants admit the material allegations contained in paragraph 5 of plaintiff's bill of complaint.

[fol. 27] 6. Defendants admit the material allegations contained in paragraph 6 of plaintiff's bill of complaint.

7. Defendants admit the material allegations contained in paragraph 7 of plaintiff's bill of complaint.

8. Defendants admit the material allegations contained in paragraph 8 of plaintiff's bill of complaint.

9. Defendants admit the material allegations contained in paragraph 9 of plaintiff's bill of complaint.

10. Defendants admit the material allegations contained in paragraph 10 of plaintiff's bill of complaint.

11. Defendants admit the material allegations contained in paragraph 11 of plaintiff's bill of complaint.

12. Defendants admit the material allegations contained in paragraph 12 of plaintiff's bill of complaint.

13. Defendants admit the material allegations contained in paragraph 13 of plaintiff's bill of complaint.

14. Defendants admit the material allegations contained in paragraph 14 of plaintiff's bill of complaint.

15. Defendants admit the material allegations contained in paragraph 15 of plaintiff's bill of complaint.

16. Defendants admit the material allegations contained in paragraph 16 of plaintiff's bill of complaint.

17. Defendants admit the material allegations contained in paragraph 17 of plaintiff's bill of complaint.

18. Answering paragraph 18 of plaintiff's bill of complaint, defendants aver they are not possessed of sufficient knowledge to either admit or deny the material allegations contained in said paragraph

[fol. 28] 19. Answering paragraph 19 of plaintiff's bill of complaint, defendants aver they are not possessed of sufficient knowledge to either admit or deny the material allegations contained in said paragraph and in this connection, defendants state that if said allegations contained in paragraph 19 of plaintiff's bill of complaint are true and plaintiff is engaged solely and exclusively as a private carrier by motor vehicle, then in that case defendants admit that plaintiff does not come within the regulations prescribed by Act No. 209 of the Public Acts of the State of Michigan for the year 1923 and that said Act does not apply in case of motor vehicles acting solely and exclusively as private carriers.

20. Defendants admit all the material allegations contained in paragraph 20 of plaintiff's bill of complaint.

21. Answering paragraph 21 of plaintiff's bill of complaint, the defendants, the Michigan Public Utilities Commission, deny that they have made any threats toward plaintiff or any other person, relative to the enforcement of said Act 209 of the Public Acts of the State of Michigan for the year 1923, but said commission admits that it is not only their intention but their sworn duty to enforce the provisions of said act and to do and perform all of the duties imposed upon said commission by virtue of said Act 209 of the Public Acts of the State of Michigan for the year 1923.

22. Defendants admit the material allegations contained in paragraph 22 of plaintiff's bill of complaint.

23. Defendants admit the material allegations contained in paragraph 23 of plaintiff's bill of complaint.

[fol. 29] 24. Answering paragraph 24 of plaintiff's bill of complaint, defendants aver that they are not in possession of sufficient information to either admit or deny the material allegations contained in said paragraph, but in this connection the commission states that they are using and expect to continue to use all of the necessary agencies of government, including the state police, to enforce the provisions of said act 209, wherever said act applies.

25. Answering paragraph 25 of plaintiff's bill of complaint, defendants state that it is their intention and their sworn duty to enforce the provisions of said act against every carrier who falls within the provisions of said act and to do and perform all of the duties imposed upon said commission by virtue of said Act No. 209 of the Public Acts of the State of Michigan for the year 1923.

26. Answering paragraph 26 of the plaintiff's bill of complaint, defendant members of the commission admit that the Michigan Public Utilities Commission did then and is now holding hearings upon applications relative to the issuing of permits to persons, firms or corporations engaged in the business of transporting persons or property by motor vehicle for hire, over the public highways of this state, in compliance with the provisions of said Act 209 of the Public Acts of the State of Michigan for the year 1923 and defendants admit that certain transportation interest other than those engaged in transporting by motor vehicle have appeared at such hearings in opposition to applications for license under said act 209 and in opposition thereto have taken the position that in some instances said applications for license should not be acted upon or [fol. 30] granted by said commission under said act, where said applications showed that said motor vehicles were to operate over said highways whereon public convenience and necessity for transportation is adequately served and provided for by transportation facilities now in existence and operation, other than motor vehicle facilities; that a majority of said commission has held that in determining the question whether a permit to operate, based upon a finding of public necessity and convenience, shall be granted, the commission takes into consideration the motor vehicle carriers operating over the proposed route and does not take into consideration the steam and electric transportational facilities serving the same territory and that this finding so made by the commission is now being reviewed on certiorari in the Supreme Court of the State of Michigan.

27. Defendants deny all of the material allegations contained in paragraph 27 of plaintiff's bill of complaint and the subdivisions (a) to (x) inclusive.

28. Defendants deny the material allegations contained in paragraph 28 of plaintiff's bill of complaint and in subdivisions I to VI, inclusive.

29. Defendants deny the material allegations contained in paragraph 29 of plaintiff's bill of complaint.

30. Defendants deny the material allegations contained in paragraph 30 of plaintiff's bill of complaint.

31. Defendants deny all the material allegations contained in paragraph 31 of plaintiff's bill of complaint.

32. Defendants admit that said Act 209 of the Public Acts of the State of Michigan for the year 1923 vests authority in the defendant commission to exercise the powers enumerated in paragraph 32 [fol. 31] of plaintiff's bill of complaint and subdivisions (a) to (h) inclusive, but denies all of the material allegations contained in the remaining subdivisions of paragraph 32 of plaintiff's bill of complaint and denies that said act is unconstitutional, null and void for any of the reasons enumerated in said paragraph 32 of plaintiff's bill of complaint.

33. Answering paragraph 33 of plaintiff's bill of complaint:

I. Defendants admit that they have no power to control common carriers of persons and property by motor vehicle except as provided in said Act 209, but deny that said Act 209 revises, alters or amends other statutes of the state of Michigan relative to common carriers by reference to their title only, or amends in the same manner, future laws hereafter enacted regulating the transportation of persons or property by other common carriers, as set forth in subdivision I of paragraph 33 of plaintiff's bill of complaint.

II. Defendants deny the material allegations contained in subdivision II of paragraph 33 of plaintiff's bill of complaint.

III. Defendants deny the material allegations contained in subdivision III of paragraph 33 of plaintiff's bill of complaint.

34. Defendants deny the material allegations contained in paragraph 34 of plaintiff's bill of complaint.

35. Answering paragraph 35 of plaintiff's bill of complaint:

I. Defendants deny the material allegations contained in subdivision I of paragraph 35 of plaintiff's bill of complaint.

[fol. 32] II. Defendants deny the material allegations contained in subdivision II of paragraph 35 of plaintiff's bill of complaint.

III. Defendants deny the material allegations contained in subdivision III of paragraph 35 of plaintiff's bill of complaint.

36. Defendants admit that the material allegations contained in subdivision I of paragraph 36 of plaintiff's bill of complaint and deny the material allegations of subdivision II of paragraph 36 of plaintiff's bill of complaint.

37. Defendants admit that there are a large number of commercial motor vehicles which do not come within the regulatory

provisions of said Act 209 of the Public Acts of the State of Michigan for the year 1923, but deny that classifying certain commercial motor vehicles as coming within said act, is discriminatory or class legislation and submit that the basis selected by the legislature is a reasonable basis of classification.

38. Defendants deny the material allegations contained in paragraph 38 of plaintiff's bill of complaint.

39. Defendants admit that a certain sum of money has been furnished in the nature of federal aid for highways, as set forth in subdivisions I, II and III of said paragraph 39 of plaintiff's bill of complaint, but defendants have no knowledge as to the exact amounts of money thus furnished by the federal government.

Defendants deny the material allegations contained in subdivision IV of paragraph 39 of plaintiff's bill of complaint.

Defendants admit that the said Dixie Highway and other highways set forth in plaintiff's bill of complaint are main trunk lines and admit that federal aid has been accepted upon said roads, but deny that under the Rural Post Roads Act of July 11th, 1916 and February 28th, 1919 and the Federal Highway Act of November 9th, 1921, the State of Michigan is stopped and prevented from [fol. 33] enforcing said Act 209 against any and all common carriers by motor vehicle who come within said act.

Defendants deny the material allegations contained in subdivision VI of paragraph 39 of plaintiff's bill of complaint.

Defendants deny the material allegations contained in subdivision VII of paragraph 39 of plaintiff's bill of complaint.

40. Defendants have not sufficient information to either admit or deny the material allegations contained in subdivision I of said paragraph 40 of plaintiff's bill of complaint.

41. Answering paragraph 31 of plaintiff's bill of complaint, defendants state that if plaintiff is a private motor vehicle carrier, as set forth in said bill of complaint, the provisions of said Act 209 will not apply to him and he will not be affected in any manner as set forth in said paragraph 1 of plaintiff's bill of complaint.

42. Answering paragraph 43 of plaintiff's bill of complaint, defendants state that if plaintiff is operating solely and exclusively as a private motor vehicle carrier as set forth in said bill of complaint, he does not fall within the provisions and conditions of said Act 209 of the Public Acts of the State of Michigan for the year 1923 and that the provisions of said act will not be enforced against him and will not result in any prosecution or proceedings against said plaintiff, as set forth in paragraph 42 of plaintiff's bill of complaint.

Wherefore, defendants state that if plaintiff is solely and exclusively a private carrier by motor vehicle, he is entitled to the relief prayed in paragraph 2 of his prayer for relief, but deny that he is entitled to the relief prayed for in paragraph 3 of the prayer

for relief, as set forth in plaintiff's bill of complaint, for any of the reasons set forth in plaintiff's bill of complaint.

[fol. 33½] Michigan Public Utilities Commission, by Peter Fagan, Secretary. Ralph Duff, William W. Potter, Sherman T. Handy, Samuel O'Dell, Samuel Dewitt Pepper, Andrew B. Dougherty, Paul W. Voorhies, Clayton C. Golden, Roy L. Vandercook, Otto R. Gearhart. Andrew B. Dougherty, Attorney General of the State of Michigan, in Pro. Per.; O. L. Smith, Assistant Attorney General, Attorneys for Defendants. Business Address: Capitol, Lansing, Michigan.

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING THE DETROIT, TOLEDO AND SHORT LINE RAILWAY TO INTERVENE—Filed Nov. 15, 1923

In the above entitled cause, on application of the Detroit, Monroe & Toledo Short Line Railway, a Michigan corporation, consented to by the parties to this cause by their respective attorneys, it appearing to the Court that said Detroit, Monroe and Toledo Short Line Railway operates an interurban electric railway line between the city of Detroit, Michigan and the City of Toledo, Ohio, parallel to and competed with by the motor vehicle service operated by plaintiff, and that it is interested in sustaining the constitutionality of Act No. 209 of the Public Acts of Michigan of 1923 as applied to the plaintiff and to other carriers operating under special contract, and not [fol. 35] holding themselves out to carry for the public generally.

It is ordered that said Detroit, Monroe and Toledo Short Line Railway be and it hereby is permitted to intervene as a defendant in said cause and to file therein the answer of which a copy is hereto attached.

Charles C. Simons, District Judge.

Dated 15th day of November, 1923.

[File endorsement omitted.]

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENOR—Filed Nov. 15, 1923

This defendant, for answer to the bill of complaint, says:

1. Answering paragraphs 1 and 2 of the bill defendant says that it is without sufficient information to either admit or deny the allegations thereof, and therefore leaves plaintiff to its proof.

2. Answering paragraphs 3 to 15, both inclusive, of the bill, the allegations thereof are admitted.

3. Answering paragraph 16 of the bill, the allegations thereof are matters of law and are neither admitted nor denied.

4. Answering paragraph 17, the allegations thereof are admitted.

[fol. 37] 5. Answering paragraphs 18 and 19, this defendant has no knowledge or information as to the allegations therein contained, neither admits nor denies them, but leaves plaintiff to its proof.

6. Paragraph 20 of the bill is admitted.

7. As to paragraph 21 of the bill, this defendant has no knowledge or information, neither admits nor denies the allegations of said paragraph, and leaves plaintiff to its proof.

8. The allegations in paragraph 22 of the bill are matters of law, and are neither admitted nor denied.

9. As to the allegations in paragraphs 23, 24 and 25 of the bill, this defendant has no knowledge or information, neither admits nor denies them, and leaves plaintiff to its proof.

10. As to the allegations in paragraph 26, this defendant admits that at certain of the hearings held by the Commission under Act 209, certain railroad and electric railway transportation interests, including this defendant, appeared in contest of applications for permits by motor vehicle owners, upon the ground that existing transportation facilities in the cases of the applications opposed were furnishing adequate and sufficient service, and that there was no public convenience or necessity for any additional transportation facilities.

11. As to the allegations of invalidity and unconstitutionality of Act 209 of the Public Acts of 1923 set forth in paragraph 27 of the bill, this defendant denies that said Act is invalid and unconstitutional, and denies the allegations made in each of the sub-sections of said paragraph.

12. It denies the allegations of paragraphs 28 to 39, both inclusive, of the bill, as to the unconstitutionality and invalidity of said [fol. 38] Act, and denies the allegations of each of the sub-sections of said paragraphs.

In this connection, and with reference particularly to sub-sections (g) and (w) of paragraph 27, and to paragraph 40, which is an amplifying statement of sub-section (w) of paragraph 27, this defendant avers that the purpose of said Act No. 209 of the Public Acts of 1923 is to regulate and control the use of public highways of the State of Michigan in the transportation of persons and property for hire by all motor vehicles that run over fixed routes or between fixed termini, including those who, like the plaintiff (according to the averments in paragraph 19 of the bill) are carrying under special contract only, and do not hold themselves out to carry for the public generally; and avers further that said Act as applied to said class of carriers is valid and constitutional.

This defendant further avers with reference to the averment in paragraph 40 of said bill, that the plaintiff has complied with the provisions of Act No. 383 of the Public Acts of the State of Michigan of 1919.

(a) That it does not appear by the bill of complaint when the tax provided for by said Act was paid by the plaintiff, or whether said tax was paid before or after May 10, 1923;

(b) That by Act No. 128 of the Public Acts of the State of Michigan of 1923 (p. 188), which took effect May 10, 1923, Section 7 of the general act for the registration of motor vehicles, which is the Act providing for the payment of the tax claimed to have been paid by the plaintiff, was so amended as to read as follows:

"The Secretary of State shall collect the following taxes before registering a motor vehicle or vehicles in accordance with the pro- [fol. 39] visions of this Act, which taxes shall be all the lawful tax collectible on such motor vehicle and shall exempt such motor vehicle from all other forms of taxation *except that the legislature may impose further and different specific taxes or privilege fees on certain* classes of such motor vehicles."

The words underscored being the words added by amendment of said Act No. 128.

(c) That said Act No. 209 of the Public Acts of 1923, the constitutionality of which is attacked in this case, took effect on May 23, 1923, and that the taxes or fees imposed thereby are of the class and character contemplated in the amendment made to said motor vehicle registration Act by said Act No. 128 of the Public Acts of 1923.

This defendant prays that the bill of complaint be dismissed.

Detroit, Monroe & Toledo Short Line Railway, by Stevenson, Carpenter, Butyel & Backus, Its Attorneys.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed December 11, 1923

In equity. Suit by Coral W. Duke, citizen of Michigan, against the Michigan Public Utilities Commission and others to enjoin enforcement by the Defendants of an act of the Michigan State Legislature.

Plaintiff claims to be engaged in transporting freight by means of motor trucks between fixed points in Ohio and fixed points in Michigan, operating upon the highways of Michigan over fixed routes; that he is engaged solely in interstate business and that he does no intrastate business; that his sole and entire business consists in carrying freight by virtue of three special contracts with three manufacturers of automobile bodies at Detroit, Michigan; that he transacts no business for anyone else, or for the public, and does not hold himself out as transacting a business of transporting automobile bodies generally for the public; that the defendants are the Michigan [fol. 41] Public Utilities Commission, and certain State and County officers who threaten to enforce as to him Act 209 of the Public Acts of the State of Michigan of 1923, which act plaintiff claims to be void, invalid and unconstitutional as to him, in that it contravenes provisions of both the State and Federal Constitutions. The title of the act in question is set up in full in the opinion this day rendered in the case of Liberty Highway Company vs. Michigan Public Utilities Commission, and the terms of the act are therein sufficiently indicated.

Beaumont, Smith & Harris, Detroit, for Plaintiffs. George E. Brand, Detroit, Amicus Curiæ for Plaintiff. Andrew B. Dougherty, Attorney General, and O. L. Smith, Assistant Attorney General, for Defendants. W. L. Carpenter and H. E. Spaulding, Detroit, for Detroit, Monroe & Toledo Short Line Railway, Intervening Defendants.

Before Donahue, Circuit Judge, Tuttle and Simons, District Judges, Under Section 266 of the Judicial Code

Per CURIAM: The several constitutional objections raised by the Plaintiff, in so far as they are similar to those raised on behalf of plaintiffs in the case of Liberty Highway Company vs. Michigan Public Utilities Commission, are sufficiently discussed in the opinion filed this day in the said cause. The plaintiff herein is a private carrier, and we have already held in the Liberty Highway case that any provisions of Act 209 of the Public Acts of Michigan of 1923 which are so broad in their terms as to be applicable also to private carriers, are foreign to the title of the act and fall under the condemnation of the Michigan constitutional requirements in the said opinion referred to. They are, however, independent of and separable from those that apply to common carriers, and their invalidity does

not affect the remainder of the act. Klatt vs. Probate Judge, 159 [fol. 42] Mich. 203; Chambers vs. Grand Lodge, 162 Mich. 344; Attorney General vs. Hillyer, 221 Mich 537; City of Lansing vs. Board of State Auditors, 111 Mich. 327.

It follows from what we have said in the Liberty Highway case that Act 209 of the Public Acts of Michigan of 1923 is valid except as to Sections 3 and 7 thereof, and that with the elimination of Section 3 there is nothing in the — that makes it applicable to private carriers.

The injunction prayed for by the Plaintiff will be granted, and it is left to the District Judges to settle the terms of the order.

Maurice H. Donahue, Arthur J. Tuttle, Charles C. Simons.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

No. 593

LIBERTY HIGHWAY COMPANY, an Ohio Corporation, and EDWARD CHARLES KABEL, Citizen of the State of Ohio, Plaintiffs,

vs.

MICHIGAN PUBLIC UTILITIES COMMISSION et al., Defendants

OPINION—Filed December 11, 1923

In Equity. Suit by Liberty Highway Company, an Ohio corporation, and Edward Kabel, a citizen of Ohio, against the Michigan Public Utilities Commission, the five members of the Commission as individuals, Andrew B. Dougherty, Attorney General of the State of Michigan, the Prosecuting Attorneys of Wayne, Ingham, Oakland and Monroe Counties, Michigan, and the Commander and one of the members of the Michigan State Police, to enjoin the enforcement by the defendants of an act of the Michigan State Legislature.

The Plaintiff, Liberty Highway Company, is an Ohio corporation engaged in transporting freight by means of motor trucks between fixed points in Ohio and fixed points in Michigan, operation upon the highways of Michigan over fixed routes. It claims to be engaged solely in interstate business and to do no intrastate business; to have developed a large and profitable business with an investment in excess of Seventy Thousand Dollars; that it employs many trucks and trailers, and that in its business it sub-contracts with others for [fol. 44] the employment of motor trucks, some of which are owned in Ohio by citizens thereof, and that the co-plaintiff, Charles Kabel, is one of its sub-contractors. The Michigan Public Utilities Commission, defendant, is a Commission created by statute of Michigan as a successor to the Michigan Railroad Commission, and is empowered by law to regulate and control certain public utilities

operated within the State. The other defendants are County and State officers whose duty it is to enforce the laws of Michigan, and by virtue of their offices threaten to enforce the provisions of Act 209 of the Public Acts of Michigan of 1923, approved May 23d, 1923, and entitled as follows; "An Act to regulate and define common carriers of persons and property by motor vehicle on public highways of this State, prescribing the payment and fixing the amount of privilege taxes for such carriers, the disposition of such taxes, and prescribing penalties for violation of this Act." The object of this action is to enjoin the enforcement of this act as against the plaintiffs on the ground that it contravenes provisions of the Federal and State Constitutions. The Act provides that no person, firm or corporation shall engage or continue in the business of transporting persons or property by motor vehicle for hire over the public highways of the State over fixed routes, or between fixed termini, unless they shall have obtained a permit from the Michigan Public Utilities Commission, which shall be issued in accordance with public convenience and necessity. It provides that the Commission shall prescribe appropriate rules and regulations; that it may withhold such permit in whole or in part; that all persons or corporations engaged in the business described in the Act shall be common carriers; that all laws of the State regulating transportation by other common carriers, including regulation of rates, shall apply to common carriers [fol. 45] by motor vehicle; that the permit to be granted shall specify routes; that whether motor vehicles operate over fixed routes, or between fixed termini, shall be a question of fact upon which the Commission's finding shall be final; that permits may be granted, suspended or revoked for violation of the act, or the rules or regulations of the Commission; that all common carriers under the act shall carry insurance for the protection of persons and property carried by them, and shall furnish an indemnity bond conditioned upon payment of just claims and liabilities; that every carrier shall pay to the Commission for the use of the State, as a privilege fee, One Dollar for each one hundred pounds of weight of each motor vehicle, which fees shall be in addition to motor vehicle tax prescribed by general law; that permits shall be good for one year, and shall be renewed upon like terms from year to year; that all fees shall be paid into the State Treasury, and are appropriated to the general highway fund for highway purposes; that violations of the act shall be punishable by fine or imprisonment or both; that the Commission may use any and all available legal and equitable remedies of a civil nature to enforce the provisions of the act, or its rules and regulations made in pursuance thereof; that each section of the act shall be independently operative, and that the unconstitutionality of any section shall not invalidate the remainder of the act, and the act is given immediate effect. Act 209 contains eleven sections, of which Sections 3 and 7 are set forth in full in the margin. The Defendants answer jointly and move for a dismissal of the Bill of Complaint.

(Section 32. Any and all persons, firms or corporations now engaged, or which shall hereafter engage, in the transportation of persons or property for hire by motor vehicles, upon or over the public highways of this State, or any of them, as above described, shall be common carriers, and so far as applicable all laws of this [fol. 46] State now in force or hereafter enacted, regulating the transportation of persons or property by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers of persons and property by motor vehicle upon or over the public highways of this state as above provided.)

(Section 7. Any and all common carriers under this act shall carry insurance for the protection of the persons and property carried by them in such amount as shall be ordered by said commission, and in insurers approved by the commissioner of insurance of this state, or shall furnish an indemnity bond running to the people of the state of Michigan conditioned upon the payment of all just claims and liabilities resulting from injury to persons or property carried by such carrier, and in a company authorized to do business in this state, in an amount to be fixed and approved by said commission.)

George E. Brand, Detroit, for plaintiffs. Andrew B. Dougherty, Attorney General, O. L. Smith, Assistant Attorney General, Lansing; W. L. Carpenter and H. E. Spaulding, Amici Curiæ, for Defendants.

Before Donahue, Circuit Judge, and Tuttle and Simons, District Judges, under Section 266 of the Judicial Code.

Per CURIAM: Plaintiffs seek to have performance of Act 209 of the Public Acts of Michigan of 1923 enjoined upon the ground of its alleged unconstitutionality, both under the Michigan and the Federal Constitutions. They contend, (1)—That it violates Section 21 of Article 5 of the Constitution of Michigan in that its real object is not expressed in the title, and in that it contains a plurality of objects. (2)—That it violates the Interstate Commerce clause of the Federal Constitution in that it unlawfully regulates and burdens interstate commerce. (3)—That the Federal Highway Act precludes the enactment of a tax for the use of roads built partly with Federal aid. (4)—That the Act is discriminatory class legislation. (5)—That it is void for uncertainty and indefiniteness.

1. Act 209 of Public Acts of Michigan of 1923 has as its general object the establishment of a scheme for licensing and for the accompanying regulation of common carriers by motor vehicle on [fol. 47] and in connection with the public highways of the State. The license fee in question is prescribed for the privilege of using such highways, and is a part of such regulatory scheme. All of the provisions of the Act applying to common carriers are germane,

auxiliary or incidental to the general purpose. The statute has only one object, which is sufficiently indicated in its title, and it is therefore not defective in this respect within Section 21, of Article 5 of the Michigan Constitution, which provides, "No law shall embrace more than one object, which shall be expressed in its title". Jasnowski vs. Board of Assessors, 191 Michigan 287; Loomis vs. Rogers, 197 Mich. 265; Attorney General vs. Hillyer, 221 Mich. 537.

The principal objection urged to the title of the act is that it purports to regulate and define common carriers generally, whereas the provisions of the act are restricted to a class of common carriers. This is not a fatal defect in the title. Where the title of the act is broader than the act itself, it has not usually been regarded as a fatal defect unless the title failed to give notice of what the act contained. Jasnowski vs. Judge Recorder's Court, 192 Mich. 139, and cases therein cited.

As, however, the title to this act has reference only to common carriers, any provisions thereof so broad in their terms as to be applicable also to private carriers, are foreign to such title and fall under the condemnation of the Michigan constitutional requirements herein referred to. Such provisions are the provisions of Section 3. They are, however, independent of and separable from those that apply to common carriers, and their invalidity does not affect the remainder of the act. Klatt vs. Probate Judge, 159 Mich. 203; Chambers vs. Grand Lodge, 162 Mich. 344; Attorney General vs. Hillyer, (Supra); City of Lansing vs. Board of State Auditors, 111 Mich. 327.

2. It is not within the power of the State even under the guise [fol. 48] of an exercise of its police power, to require a license for the privilege of engaging in or otherwise interfering with interstate commerce as such, for that would be to regulate such commerce, *to* the power to do which has been surrendered by the State to Congress. Wabash, St. Louis & Pacific Railway Company vs. Illinois, 118 U. S. 557; Robbins vs. Taxing District, 120 U. S. 489; Bowman vs. Chicago & Northwestern Railway Company, 125 U. S. 465; Harmon vs. Chicago, 147 U. S. 396; Brennan vs. Titusville, 153 U. S. 289; Barrett vs. New York, 232 U. S. 14; Sault Ste. Marie vs. International Transit Company, 234 U. S. 333; Askren vs. Continental Oil Company, 252 U. S. 444; Lemke vs. Farmers' Grain Company, 258 U. S. 50.

The commerce clause of the Federal constitution does not, however, deprive the States of the right to reasonably regulate under their police power the use of their public highways, and to that end to require a license and impose a reasonable charge therefor, for the privilege of such use even if thereby interstate commerce is incidentally affected, provided that such regulation, license and charge bear a reasonable relation to the safe and proper maintenance and protection of such highways, do not obstruct or burden interstate commerce, and are not in conflict with Federal legislation on the same subject enacted within constitutional limitations.

Escanaba & Lake Michigan Transportation Company vs. Chicago, 107 U. S. 678; St. Louis vs. Western Union Telegraph Co., 148 U. S. 92; Minnesota Rate Cases (Simpson vs. Shepard), 250 U. S. 352; Hendrick vs. Maryland, 235 U. S. 610; Kane vs. New Jersey, 242 U. S. 160; McKay Telegraph & Cable Co., vs. Little Rock, 250 U. S. 94; Interstate Motor Transit Company vs. Kuykendall, 284 Fed. 882; Stage Company vs. Kozer, 104 Ore. 600; 209 Pac. 95; Northern Pacific Railway Company vs. Schoenfeldt 213 Pac. 26 (Wash).

The case of Interstate Motor Transit Company vs. Kuykendall, [fol. 49] Supra, involved a statute similar in nearly all essential respects to Act 209. The plaintiff was engaged in interstate commerce between Seattle and San Francisco, and did no intrastate commerce business. This case was heard by a special court convened under Section 266 of the Judicial Code, and the statute was held valid as against the same constitutional objections as are here urged. The Kuykendall case follows and is largely ruled by the decisions of the Supreme Court in Kendrick vs. Maryland, Supra, and Kane vs. New Jersey, Supra.

In the Kendrick case Mr. Justice McReynolds said:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive of the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive. * * * In the asbence of national legislation covering the subject a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others * * * This is but an exercise of the police power, uniformly recognized as belonging to the states, and essential to the health, safety and comfort of its citizens; and it does not constitute a direct and material burden on interstate commerce. * * * The amount of the charges and method of collection are primarily for determination by the state itself, and so long as they are reasonable, and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce."

Plaintiffs have not successfully distinguished the Kane and Kendrick cases from the instant case, in so far as they relate to interstate commerce. The vehicles sought to be regulated by the Michigan statute are commercial vehicles carrying both passengers and freight. It may be well considered that their operations involved [fol. 50] a greater menace to public safety and are more destructive of the highways than are private automobiles operated for pleasure, and that they call for a greater degree of regulation and a higher compensation for the use of special facilities afforded.

The amount of the privilege tax for the use of the highways need not necessarily be limited, even to those engaged in interstate commerce, to the actual cost of such regulation, but may also, as appar-

ently is the case here, include reasonable compensation for the use of the highways and fair provision for anticipated repairs and improvements thereon. Western Union Telegraph Company vs. New Hope, 187 U. S. 419; Atlantic and Pacific Telegraph Company vs Philadelphia, 190 U. S. 160; Kane vs. New Jersey, Supra.

It follows that such provisions of the act as are confined in their application to regulation of common carriers in connection with the public highways, are not a direct burden upon interstate commerce, even though they may incidentally affect interstate commerce, but any provisions which are not so confined constitute an attempt by the state to regulate, and therefore to unduly burden interstate commerce, and they are for that reason in contravention of the Federal Constitution, and void. Such provisions are those contained in Sections 3 and 7 of the Act. Section 3 has already been referred to. The provisions of Section 7 providing for insurance and for indemnity bonds for the protection of persons and property carried, are a direct burden upon interstate commerce, and are for that reason void. The provisions of both sections are separable from and independent of the remainder of the act, and so do not affect its validity. Interstate Motor Transit Co., vs. Kuykendall, 284 Fed. 882.

[fol. 51] 3. Section 9 of the Federal Highway Act of November 9th, 1921, (42 Stat. 212), provides "That all highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds". This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act had reference to the analagous fees imposed under general motor vehicle license laws, or to laws licensing drivers of such vehicles). State vs. Vigneaux, 130 La. 424; 58 So. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached, as between the Federal government and the State, to the contribution of aid provided by Federal legislation, and cannot deprive the State of its power and duty as trustee of the public highways for the benefit of the people of the State, to enact reasonable regulations in the exercise of its police power over such highways.

4. The State may within its police power reasonably regulate the manner and extent of the use of its public highways by common carriers. Legislation of essentially the same character as that of Act 209 has been widely enacted and sustained by the courts against constitutional objections such as are here urged. Nolen vs. Riechman, 225 Fed. 812; Lutz vs. New Orleans, 235 Fed. 978, affirmed in 237 Fed. 1018 (C. C. A. 5). Schoenfeld vs. Seattle, 265 Fed. 726; Hadfield vs. Lundin, 98 Wash. 657, 168 Pac. 516; West vs. Asbury Park, 89 N. J. L. 402; 99 Atl. 190; Jitney Bus Association vs. Wilkesbarre, 256 Pa. 462; 100 Atl. 954; West Suburban Company vs. Chicago and West Towns Railway Company, 140 N. E. 56 (Ill.); Western Association vs. Railroad Commission, 173 Calif. 802; 162 Pac. 391; New Orleans vs. LeBlanc, 139 La. 113; 71 So. 248; Huston vs. Des Moines, 176 Iowa 455; 156 N. W. [fol. 52] 889; Cummins vs. Jones, 79 Ore. 276; 155 Pac. 171; Dew-

ser vs. Wichita, 96 Kan. 820; 153 Pac. 1194; Ex parte Sullivan, 77 Tex. Cr. Rep. 72; 178 S. W. 537; Memphis vs. Tennessee, 133 Tenn. 83; 179 S. W. 631; Ex parte Dickey, 76 W. Va. 576; 85 S. W. 781.

The statute is not class legislation because it applies only to common carriers operating over fixed routes. It is well known that commercial motor vehicle transportation and highway maintenance expense resulting therefrom, is rapidly increasing; that traffic on main highways is greatly congested. It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property and greater damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, it being settled that every state of facts sufficient to sustain a classification which can be reasonably conceived of as having existed when the statutes was enacted will be assumed by the Court. Crecent Cotton Oil Company vs Miss., 257 U. S. 129; Nolen vs. Reichman, supra.

The latter case was decided by a special court convened under Section 266 of the Judicial Code, in the District Court for the Western District of Tennessee, Western Division, opinion rendered by Warrington, Circuit Judge, McCall and Sanford, District Judges. There was involved a statute seeking to regulate as common carriers "any public conveyance propelled by steam, gasoline, electricity, or other power, for the purpose of transportation similar to that ordinarily afforded by street railways, but not operated upon fixed tracks, by indiscriminately accepting and discharging passengers along the way and course of operation". The purpose of the statute [fol 53] was to regulate vehicles commonly known as "jitneys", and it was contended that the act set up an unreasonable classification and was violative of the fourteenth amendment to the Constitution of the United States. The court found that there is a substantial distinction between a street railway and a jitney, and between a jitney and a taxicab, saying, "While the services they all render are those of a common carrier, yet the services are so different in detail that it would be wholly impracticable to write a statute applicable to them all and serve at the same time the convenience and safety of the public". The distinction between a jitney and a taxicab is precisely the distinction which the plaintiff contends results in discriminatory classification in the instant case. The jitney operates upon a schedule over fixed routes and between fixed termini, while the operations of the taxicabs are more flexible and occasional. They are both common carriers, but the incidents of their operation differ and call for different kinds of regulation.

5. Section 3 of the act providing among other things that all laws of the state regulating common carriers shall apply also to common carriers by motor vehicle on the public highways of the State, would seem to be invalid for the additional reason that it is

too vague and uncertain to furnish a sufficiently definite standard of guilt. Kinnane vs. Detroit Creamery Company, 255 U. S. 102. Plaintiff's attack upon Act 209 for uncertainty and indefiniteness is directed wholly to Section 3, and we have already indicated the invalidity of this section under constitutional provisions elsewhere referred to.

The additional contention raised by the Bill of Complaint that the Act confers judicial and legislative powers on an executive tribunal is, in our opinion, without merit, the powers and duties with which the Public Utilities Commission is clothed by the statute [fol. 54] being such as are uniformly held to be properly vested in an administrative board of this kind. Arver vs. United States, 245 U. S. 366; Mackin vs. Detroit Timkin Axle Co., 187 Mich. 19.

Equally untenable is the claim that the act is void because given immediate effect. Even if the legislature clearly abused (as has not been shown) its broad discretion in this respect (People vs. Urcavitch, 210 Mich. 431), the statute became effective at least at the expiration of the period prescribed by the Michigan Constitution for bills not entitled to immediate effect. Attorney General vs. Lindsay, 178 Mich. 524; Simpson vs. Gage, 195 Mich. 581.

We conclude that Act 209, except sections 3 and 7 thereof, is a valid exercise of the police power of the state, and that the regulatory provisions thereof for the use of the state highways are operative independent of sections 3 and 7. Until plaintiffs have offered to comply with those provisions of the act which are sustained they may not invoke the equitable arm of the Court as to those provisions of the act which are a direct burden upon interstate commerce.

The injunction prayed for in the Bill of Complaint is denied.

Maurice H. Donahue, Circuit Judge. Arthur J. Tuttle, Charles C. Simons, District Judges.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER—Filed Jan. 15, 1924

This cause came on to be heard upon the order to show cause why an interlocutory injunction should not issue and after reading the bill of complaint and the annexed affidavits and the answers thereto, and Percy J. Donovan of Beaumont, Smith and Harris, being heard on the motion and O. L. Smith, Esquire, Assistant Attorney General of the State of Michigan, and Hinton E. Spalding, [fol. 56] Esquire, being heard in opposition for the defendants, the latter for the Intervening defendants the Detroit, Monroe and Toledo Short Line Railway, and briefs having been submitted by each of aforesaid counsel and by George E. Brand, Amicus Curiæ

for plaintiff, and the Court being fully advised in the premises, and having heretofore rendered its opinion granting the interlocutory injunction as prayed for by the plaintiff, Duke Cartage Company, it is this day

Ordered that Michigan Public Utilities Commission, Ralph Duff, William W. Potter, Sherman T. Handy, Samuel O'Dell, and Samuel Dewitt Pepper, members of said Michigan Public Utilities Commission, and Andrew B. Dougherty, Attorney General of the State of Michigan, Paul W. Voorhies, Prosecuting Attorney of Wayne County, Michigan, and Clayton C. Golden, Prosecuting Attorney of Monroe County, Michigan; Roy L. Vandercook, Commanding Officer of the Michigan State Police, and Otto R. Gearhart, a member of the Michigan State Police, and their certain associates, successors, assigns, officers, managers, servants, clerks, agents and workmen, and each of them be and they are hereby enjoined from enforcing or attempting to enforce against Coral W. Duke, doing business as the Duke Cartage Company or any of his trucks, employees or equipment, Act No. 209 of the Public Acts of 1923 of the State of Michigan and from enforcing against him or his servants, employees or equipment, any of the exactions of penalties or fees in said act provided—and from in any manner molesting or interfering with said plaintiff Coral W. Duke, doing business as the Duke Cartage Company, or his equipment or any person employed by him in the prosecution thereof, until further order of this Court.

Charles C. Simons, District Judge.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 15, 1924

Now come the defendants in the above entitled cause and file the following assignment of errors, upon which they will rely upon the prosecution of the appeal in the above entitled cause from the order made by this Honorable Court on the 15th day of January, 1924, granting an interlocutory injunction.

I

That the United States District Court for the Eastern District of Michigan, Southern Division thereof, and the Hon. Maurice H. Donahue, Circuit Judge, and the Hon. Arthur J. Tuttle and Charles C. Simons, District Judges, who heard the application for interlocutory injunction and made the said order granting such injunction, erred in granting said injunction.

[fol. 58] II

That said District Court and said Judges erred in holding that Act No. 209 of the Public Act of Michigan of 1923 does not apply to the plaintiff in this cause and that the business of said plaintiff is not subject to regulation under and in accordance with the provisions of said Act.

III

That said District Court and said Judges erred in holding that Section three of said Act No. 209 of the Public Acts of Michigan of 1923 is invalid and unconstitutional because in violation of the constitution of the State of Michigan.

IV

That said District Court and said Judges erred in holding that Section three of said Act No. 209 of the Public Acts of Michigan of 1923 is invalid and unconstitutional because in violation of the Federal Constitution, and because it is a direct burden upon Interstate Commerce.

V

That said District Court and said Judges erred in holding that Section seven of said Act No. 209 of the Public Acts of Michigan of 1923 is invalid and in violation of the Federal Constitution because its provisions are a direct burden upon Interstate Commerce.

Andrew B. Dougherty, in pro. per.; O. L. Smith, Asst. Atty. Genl., Attorneys for Appellants other than the Detroit, Monroe & Toledo Short Line Railway. Stevenson, Carpenter, Butzel & Backus, Attorneys for Appellants the Detroit, Monroe & Toledo Short Line Railway.

[File endorsement omitted.]

[fol. 59] In United States District Court

[Title omitted]

Petition for and Order Allowing Appeal—Filed Jan. 15, 1923

To the Honorable Arthur J. Tuttle and Charles C. Simons, District Judges:

The above named defendants feeling ag-rieved by the order made and entered in the above entitled cause on the 15th day of January, 1924, granting an interlocutory injunction restraining and preventing the enforcement against the Plaintiff of Act No. 209 of the Public Acts of Michigan of 1923, as prayed in the bill of complaint,

does hereby appeal from said order to the Supreme Court of the United States for the reasons set forth in the assignment of error filed herewith, and defendants pray that appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United [fol. 60] States sitting at Washington under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

Michigan Public Utilities Commission, Ralph Duff, William W. Potter, Sherman T. Handy, Samuel O'Dell, members of said Michigan Public Utilities Commission, and Andrew B. Dougherty, Attorney General of the State of Michigan; Paul W. Voorheis, Prosecuting Attorney of Wayne County, and Clayton C. Golden, Prosecuting Attorney of Monroe County, Michigan; Roy L. Vandercook, Commanding Officer of the Michigan State Police, and Otto R. Gearhart, a member of the Michigan State Police, by William W. Potter, Chairman. Detroit, Monroe & Toledo Short Line Railway, by Stevenson, Carpenter, Butzel & Backus, Its Attorneys.

Appeal allowed without giving bond, bond having been waived.
Charles C. Simons, District Judge.

Giving of bond on appeal is hereby waived Jan. 15, 1924.
Beaumont, Smith & Harris, Attys. for Appellees.

[File endorsement omitted.]

[fol. 61] Supreme Court of the United States, Washington, D. C.

Citation—In usual form showing service on Beaumont, Smith & Harris; omitted in printing

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[fol. 62] In United States District Court

[Title omitted]

Stipulation re Transcript of Record—Filed Jan. 24, 1924

It is hereby stipulated and agreed by the parties to the above entitled cause by their respective attorneys that the transcript of the record on the appeal of said cause from the order granting an inter-

locutory injunction therein, to the Supreme Court of the United States shall consist of the following portions of the record:

(1) Bill of Complaint and affidavit attached.

(2) The answers of the defendants with the order permitting the Detroit, Monroe and Toledo Short Line Railway to intervene as defendant, and answer.

(3) The Opinion of the Court on the argument of the application for interlocutory injunction, and the Opinion of the Court on the application for interlocutory injunction in the cause of Liberty Highway Company, et al., vs. Michigan Public Utilities Commission, et al., which was argued at the same time, and which is appended because of the discussion therein of questions raised in the Duke Case, and the reference thereto in the Opinion in the Duke Case.

(4) The Order for Interlocutory Injunction.

(5) Petition for Appeal, assignments of error and order allowing appeal and waiver of appeal bond.

(6) Citation on appeal and Clerk's Certificate.

Beaumont, Smith & Harris, Attorneys for Plaintiff. Andrew B. Dougherty, Attorneys for Defendants except the Detroit, Monroe & Toledo Short Line Railway. Stevenson, Carpenter, Butzel & Backus, Attorneys for Defendant the Detroit, Monroe and Toledo Short Line Railway.

[File endorsement omitted.]

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to claim of appeal, of Michigan Public Utilities Commission, et al., Defendants in the above entitled cause, that it is a true and correct copy of all the records and proceedings in said cause designated by counsel for respective parties, to be included in Clerk's return to said writ of error, as appear of record and on file in my office; that I have compared the same with the originals so designated and that it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Court, at Detroit, in said District, this ninth

day of February, in the year of our Lord, one thousand nine hundred and twenty four, and of the Independence of the United States of America, the one hundred and forty eighth.

Elmer W. Voorheis, Clerk United States District Court, Eastern District of Michigan. (Seal of the U. S. District Court, Eastern District of Mich.)

Endorsed on cover: File No. 30,115. E. Michigan D. C. U. S. Term No. 283. The Michigan Public Utilities Commission, Ralph Duff, William W. Potter, et al., etc., et al., appellants, vs. Coral W. Duke, doing business as Duke Cartage Company. Filed February 11, 1924. File No. 30,115.

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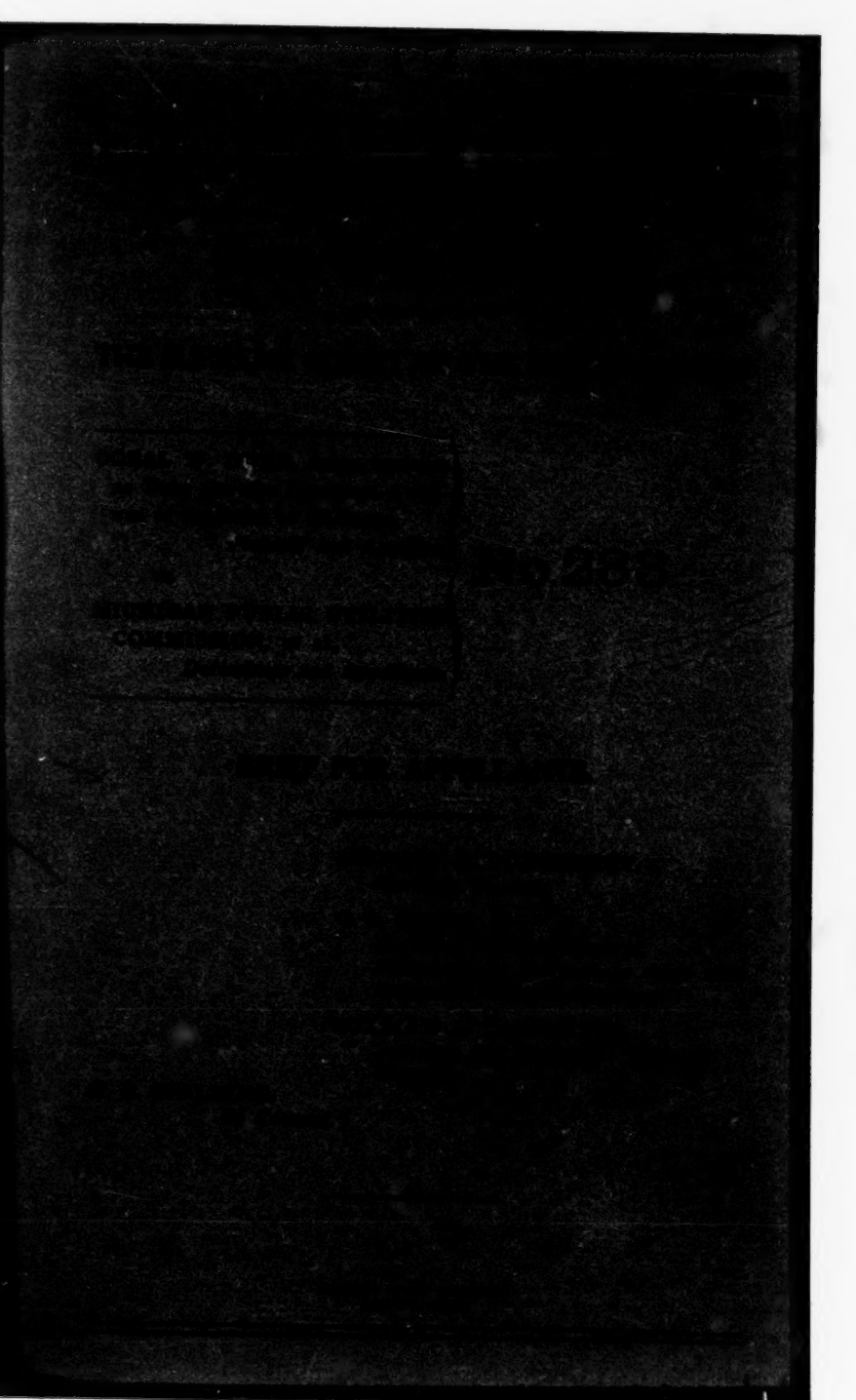

INDEX

ARGUMENT

LIST OF CASES CITED

UNITED STATES OF AMERICA

THE SUPREME COURT OF THE UNITED STATES

CORAL W. DUKE, doing business as Duke Cartage Company, a citizen of the State of Michigan,
Plaintiff and Appellee,

vs.

MICHIGAN PUBLIC UTILITIES COMMISSION, et al.,
Defendants and Appellants.

BRIEF FOR APPELLANTS.

This is an appeal from an order made under Sec. 266 of the Judicial Code upon the application of the appellee, Coral W. Duke, granting an interlocutory injuction restraining the enforcement against him of Act No. 209 of the Public Acts of the State of Michigan of 1923, upon the ground that sections 3 and 7 of said Act are unconstitutional.

The bill of complaint (Par. 19 R. p. 3) represents that the plaintiff (the present appellee) is engaged in the transport of freight by motor vehicles between points in the State of Michigan and the State of Ohio, operating in part over public highways of the state, but that all of the

freight which he carries is carried under certain contracts with automobile manufacturers and that he does not hold himself out as a carrier for the public generally. It was filed to restrain upon constitutional grounds the enforcement against the plaintiff and his business of Act No. 209 of the Public Acts of Michigan of 1923, which as stated in its title is

> "An Act to regulate and define common carriers of persons and property by motor vehicle on public highways of this state, prescribing the payment and fixing the amount of privilege taxes for such carriers, the disposition of such taxes and prescribing penalties for violations of this act."

The act is as follows (See Rec. 4):

> AN ACT to regulate and define common carriers of persons and property by motor vehicle on public highways of this state, prescribing the payment and fixing the amount of privilege taxes for such carriers, the disposition of such taxes, and prescribing penalties for violation of this act.

The People of the State of Michigan Enact:

Section 1. After thirty days from the effective date of this act, no person, firm or corporation shall engage or continue in the business of transporting persons or property, by motor vehicle, for hire, upon or over the public highways of this state, over fixed routes or between fixed termini, or hold themselves out to the public as being engaged in such business, unless and until they shall have obtained from the Michigan Public Utilities Commission a permit so to do, which said permit shall be issued in accordance with the public convenience and necessity and

shall not be assignable: Provided, That this act shall not apply to carriers operating exclusively within cities or villages.

Sec. 2. Said commission shall, by general order, prescribe such rules and regulations as shall, by it, be deemed appropriate, under this act. Said commission may withhold such permit in whole or in part, when it appears to the commission that the applicant is not or will not be able to furnish adequate, safe or convenient service to the public, but not without just cause.

Sec. 3. Any and all persons, firms or corporations, now engaged, or which shall hereafter engage, in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state, or any of them, as above described, shall be common carriers, and, so far as applicable all laws of this state now in force or hereafter enacted, regulating the transportation of persons or property by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers of persons and property by motor vehicle upon or over the public highways of this state as above provided.

Sec. 4. Such permit, when granted, shall specify the route or routes over which the person, firm or corporation to whom the same may be granted shall have a right to operate, and may cover the whole or any part of the route or routes applied for. Any law or laws now in force or hereafter enacted, regulating the practice before said commission, or the method of reviewing its order, shall apply with equal force and effect to proceedings had or taken before said commission under this act.

Sec. 5. "Fixed routes, or between fixed termini," as used herein, or in any permit hereunder, shall mean the route or termini over or between which said carrier shall usually or ordinarily operate such motor vehicle, though departures from such route or termini may be periodical or irregular. Whether such motor vehicle is operated over fixed routes or between fixed termini shall be a question of fact, and the commission's finding thereon shall be final.

Sec. 6. Said commission may, after notice given and hearing granted to any person, firm or corporation to whom a permit may have been granted, suspend or revoke the same for a violation of this act or of any lawful order, rule or regulation of said commission.

Sec. 7. Any and all common carriers under this act shall carry insurance for the protection of the persons and property carried by them in such amount as shall be ordered by said commission, and in insurers approved by the commissioner of insurance of this state, or shall furnish an indemnity bond running to the people of the state of Michigan, conditioned upon the payment of all just claims and liabilities resulting from injury to persons or property carried by such carrier, and in a company authorized to do business in this state, in an amount to be fixed and approved by said commission.

Sec. 8. Such permit shall entitle the carrier to whom it is issued to transport persons or property or both, over the route or routes and between the termini indicated on the face of such permit. Every such carrier shall pay to the commission for the use of the state, at or prior to the

issuance of the permit, and as a fee for the privilege of engaging in the business defined in section one hereof, for one year, a sum of money to be computed as follows: One dollar for each one hundred pounds weight of each motor vehicle employed by it in such business; and shall thereafter pay at a similar rate for each one hundred pounds weight of each motor vehicle added or acquired during any license year, which fees shall be in addition to any motor vehicle tax prescribed by the general motor vehicle law of the state. Each permit shall be good for a period of one year from its date, and at the expiration thereof may be renewed by the commission upon like terms and conditions from year to year thereafter. All fees received hereunder shall be paid into the state treasury, and are hereby appropriated to the general highway fund of the state for highway purposes. Nothing in this section shall be construed to interfere with the right of any city or village to the reasonable control by general regulation, applicable to all motor vehicles, of its streets, alleys and public places, or to authorize a carrier to do a local business without the consent of the municipality in which such local business is wholly carried on.

Sec. 9. Any person, firm or corporation violating any of the provisions of this act, or any lawful order, rule or regulation of said commission shall be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail not over ninety days, or both such fine and imprisonment in the discretion of the court; and if a corporation, its corporate officers, having the management of the business of such carrier, shall be personally subject to a fine not exceeding one hundred

dollars or imprisonment in the county jail not more than ninety days, or both such fine and imprisonment in the discretion of the court.

Sec. 10. Said commission may use any and all available legal and equitable remedies of a civil nature to enforce the provisions of this act, or any lawful order, rule, or regulation made in pursuance hereof.

Sec. 11. Each section of this act shall be independently operative, and if any of said sections shall be declared invalid by any court of competent jurisdiction, it shall not affect or invalidate the remainder of this act.

This act is ordered to take immediate effect.

Approved May 23, 1923.

Various propositions going to the constitutionality of the entire act were urged in this case and in a similar suit brought by the Liberty Highway Company, which was argued at the same time, but the act was sustained with the exception of sections 3 and 7. The principal discussion of the validity of these sections is in the opinion in the Liberty Highway Company's case, which for that reason is incorporated in the record (R. p. 29).

Section 3 provides in substance that all who engage in transportation of persons or property for hire by motor vehicle over public highways of the state over fixed routes or between fixed termini, shall be common carriers, and subjects them to all other laws regulating transportation by common carriers *so far as applicable.* Section 7 requires all carriers regulated by the act to protect their

patrons against injury sustained by persons or property carried, while in transport on the state highways, either by insurance or by an indemnity bond (R. pp. 4, 5).

As to section 3, the Court was of the opinion that because in terms it applies to those carrying under private contract, as well as to those carrying for the public generally, it was not within the title and, therefore, violated section 21 of Article V of the Michigan Constitution providing that "no law shall embrace more than one object, which shall be expressed in its title." The Court was also of the opinion that this section of the act, because of its provision that so far as applicable all laws of the state regulating transportation by other common carriers shall apply to carriers under the act, was too vague and uncertain to furnish a sufficiently definite standard of guilt. See opinion Liberty Highway case (R. pp. 32, 35-6).

As to section 7 (and seemingly as to section 3), the Court was of the opinion that its provisions are void as a direct burden upon interstate commerce.

See opinion Liberty Highway case (R. p. 34).

Upon these grounds the Court held sections 3 and 7 of the Act to be unconstitutional and void, decided that the Act does not, therefore, apply to private carriers, and granted the injunction complained of accordingly. We claim that the court was in error in so holding and in each of its conclusions above stated. The several errors complained of are covered by the assignments of error 1 to 5. (Rec. p. 37.)

It was argued also for the plaintiff, though the point was not passed on by the Court, that to make those carrying under private contracts common carriers was a taking of private property without compensation, in contravention to the 14th amendment to the United States Constitution.

The questions then presented upon this appeal are:

1. Whether consistently with the 14th amendment the legislature may require those engaged, or after the passage of the Act engaging, in motor vehicle transportation for hire on public highways, thereafter to carry on that business as common carriers.

2. Whether a provision making all who engage in motor vehicle transportation over public highways common carriers under the act and subject to regulation as such, is within the title of an act "to regulate and *define* common carriers of persons and property by motor vehicle on public highways of this state," in conformity with Section 21 of Article 5 of the Michigan Constitution above referred to.

3. Whether the provision subjecting carriers under the act to all other laws of the state regulating transportation by other common carriers *so far as applicable*, is invalid because indefinite.

4. Whether a state may require all carriers over its highways, including those engaged in interstate transportation, by insurance or bond to protect their patrons against injuries sustained in carriage upon the highways of the state.

ARGUMENT

I.

The 14th amendment is not violated by requiring all those using public highways in motor vehicle transportation for hire, including those who have previously done that business under private contract, to become common carriers.

A common carrier is not required to carry goods that he has not facilities to handle, or for which he has not space, nor is he required to carry goods of a class that he does not hold himself out to carry. He must, however, carry for all who offer, indifferently. This is the distinguishing characteristic of his business.

Highways are established for the use and convenience of the public. Their regulation and control is in the legislature or in those subordinate bodies, administrative or municipal to which it has delegated the power of regulation. The legislature may impose any regulation or limitation upon the use of highways that might conceivably promote the public interest—anything not clearly arbitrary, anything that may facilitate traffic or make it safe, lessen the wear or prevent the destruction of the road bed, or relieve the public burden of construction and maintenance—is within legislative competence. It may limit the speed and weight of vehicles. It may prescribe types of vehicular construction. It may exclude traffic of certain kinds, or condition the use of highways in such traffic upon the payment of certain fees.

These principles are well established, and the following illustrative cases might be multiplied indefinitely.

Scovel vs. Detroit, 146 Mich. 93.

In this case, under statutory authority, a certain portion of a boulevard had been set aside as a speed-way. This action was attacked by the owners of abutting property as in contravention of the purposes of a boulevard and therefore invalid. It was sustained as the exercise of a power which the legislature was competent to confer.

Commonwealth vs. Kingsbury, 199 Mass. 542.

This case sustained the exclusion of automobiles from certain streets under statutory authority, the Court saying, (page 546):

> "The right of the legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town, seems to us well established both upon principle and authority."

Dobson vs. Mescall, 199 N. Y. S., 800.

This case sustained an amendment to the Public Service Commission Act of New York. The amendment placed bus lines under the jurisdiction of the Commission, and provided that a bus line should not receive a certificate of public convenience and necessity without procuring the consent of the local authorities of the city in which the line was to operate. The Court say (page 802):

> "There is no constitutional right to use a public highway in the operation of the private business of a common carrier for profit without the consent of

> the state and no constitutional right would be abridged by the refusal of such consent."

People vs. Rosenheimer, 209 N. Y. 115.

This case sustained a statute requiring any person operating a motor vehicle, knowing that through his fault or through accident, injury had been caused to a person or property, to report the accident, giving his name and address. The objection raised was that this was in violation of the constitutional provision that no person should be compelled in a criminal case to be a witness against himself. The statute was sustained on the ground that the legislature might prohibit altogether the use of motor vehicles upon the highways. The Court say on page 120:

> "Doubtless the legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person must be exercised in a mode consistent with the equal rights of others to use the highway."

After pointing out the special need of the regulation of motor vehicle use, and the fact that in view of the danger incident thereto the legislature might prohibit the use of such vehicles the opinion continues:

> "Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a

privilege the legislature may prescribe on what conditions it shall be exercised."

Northern Pacific Railway Co. vs. Schoenfeldt, 123 Wash., 579.

Here the Court in sustaining the constitutionality of a statute regulating motor vehicle transportation, against the objection that such regulation was not within the police power of the State, said (page 585):

"We have repeatedly held that the legislature may regulate the use of the highways for carrying on business for private gain, and that such regulation is a valid exercise of the police power."

In this connection the Court quotes from its former decision in

Hadfield vs. Lundin, 98 Wash., 657.

"The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege and not as a matter of natural right."

Ex Parte Dickey, 76 W. Va., 576.

This case involved the constitutionality of an ordinance licensing and regulating the operation of jitney busses. In sustaining the ordinance the Court say (page 578):

> "As regards legislative power or control, the business or interest regulated by the ordinance is clearly distinguishable from vocations the pursuit of which does not involve the use of public property. The right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means, can neither be denied nor unduly abridged by the legislature; for the preservation of such right is the principal purpose of the constitution itself. * * * But when a citizen claims a private right in public property, such as a street or park, a different situation is presented. Such properties are devoted primarily to general and public, not special or private uses, and they fall within almost plenary legislative power and control. * * * The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature."

The Court quotes with approval, page 580, from

***Jersey City Gas Co. vs. Dewight,* 29 N. J. Eq. 242,**

the statement that

> **"The rule must be considered settled that no person can acquire the right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power."**

The same principle is affirmed by this Court in *Packard vs. Banton,* 264 U. S., 140, which was a suit to enjoin the enforcement of a state law, alleged to violate the Fourteenth Amendment because it required persons engaged in the business of carrying passengers for hire in motor vehicles on public streets to give security for the payment of judgments for death or injury to persons or property caused in the operation or by defective construction of the vehicle. It was contended that the Act was an unreasonable discrimination against those engaged in operating motor vehicles for hire in favor of those operating such vehicles for private ends and in favor of street cars and motor omnibuses. In overruling this contention, the court says (p. 144):

> "If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper."

It was further contended that the requirements of the statute were so burdensome as to be confiscatory and to result in depriving appellant of his property without due process of law. In overruling this contention, the Court say (p. 145):

> "Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former."

It is obvious that while the cases in which this rule was laid down were mostly cases of common carriers, the principle that those who use the public highways as a place of business for private gain are exercising a privilege and not a right, is as applicable to private as it is to public carriers.

To the same end, the protection of the public interest, the legislature may therefore require those who use the public highways in their private business of transportation for hire, to carry for the public at large as well as under private contract, and to be subject to regulation and control as common carriers.

The legislature can not subject private property to public use without compensation, but it may condition the use of public property—a public facility—in the transaction of a private business in such a manner as to insure the convenience and accommodation of the public.

It is therefore competent for the legislature to require those who at the passage of the act are engaged or thereafter engage in motor vehicle transportation for hire on the public highways to do that business as common carriers. That is, without precluding them from carrying out such special contracts as they have made, it may compel them, if they continue in the business, to become common carriers and submit to the regulations which the act imposes on such carriers.

The Pipe Line Cases, 234 U. S. 548.

In this case, an amendment made in 1906 to the Interstate Commerce Act was sustained. The important provision was that the act was made to apply to all corporations and persons engaged in the transportation of oil or other commodity, except water and gas, by pipe lines or partly by pipe lines "who shall be considered and held to be common carriers within the meaning and purpose of this act." An order has been made by the Interstate Commerce Commission requiring the Standard Oil Company and other companies owning or controlling oil pipe lines to file schedules of rates and this order was attacked as unconstitutional. The Court held that with the exception of lines used only for the purpose of conducting oil from the owner's own wells to his refinery, the act applies to any person engaged in transportation of oil by pipe lines. The opinion states (p. 559):

> "The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the previous declaration to the

> meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such * * * As applied to them, while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers."

It appeared that the pipe line companies while they transported all oil that was offered, compelled outsiders to sell it to them before transportation and it was claimed that under these circumstances the companies could not be made common carriers. Answering this objection, the Court say (p. 561):

> "The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees if they carry must do it in a way that they do not like."

So in the present case, those who now carry under private contract, while not precluded from executing their outstanding contracts and not necessarily precluded from making other such contracts in the future, must nevertheless in the future conduct their business as common carriers. It is clear that if Congress can impose such an obligation upon pipe line companies operating over private right-of-way, a State Legislature may impose such an obligation upon carriers over public highways.

It was claimed in the court below by counsel for the present appellee that the statute, if applied to him, deprives him of the right to carry out his existing contracts of carriage, which fully occupy his entire equipment, and compels him to abandon these contracts and carry for the public at large. A common carrier is not required to furnish carriage for any one beyond the capacity of his equipment, nor being under contract for carriage is he obliged to abandon that contract in order to furnish transportation for such other persons as may demand his services.

A railroad being a common carrier may make a special contract for the carriage of particular kinds of property.

Michigan Southern Railroad Co. vs. McDonough, 21 Mich., 165, see page 196.

Lake Shore Railroad Co. vs.. Perkins, 25 Mich., 329.

Plaintiff's counsel in the Court below referred to, and presumably will here rely upon the case of

Producers' Transportation Company vs. Railroad Commission, 251 U. S., 228.

This case involved the validity of an order made by a State Railroad Commission requiring a pipe line company to file with the commission a schedule of its rates. The order was made under a statute which declared that everyone operating a pipe line for the transportation of oil directly or indirectly to or for the public for hire, and which is constructed on a public highway, and in favor of which the right of eminent domain exists, should be deemed a

common carrier, and subject to the jurisdiction of the railroad commission.

The pipe line company contended that the evidence taken by the commission, and which was also before the Supreme Court of California, which sustained the order, established that the pipe line was constructed solely to carry oil for particular producers under private contract; that there was no devotion of the line to public use and that the statute was therefore repugnant to the 14th amendment. The Court found, as had the Supreme Court of California, that these contentions were not supported by the facts: (1) because the company was by its articles of incorporation authorized to carry on a general transportation business; (2) because in acquiring its right of way it had exercised the power of eminent domain as a common carrier; (3) because it did in fact carry oil for all who sought its service, that is for the public.

In the course of the opinion, and before consideration of the facts, the Court remarked, page 230, (and this is the passage upon which plaintiff's counsel doubtless rely):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment."

This is indubitable law, but as the Court point out it does not apply to a case where the line of transportation is acquired for public use under the power of eminent domain. Nor does it apply to a case like the present, where the conduct of the business involves the use of a transportation line already belonging to the public, and devoted to the public use, a public highway.

The cases cited by the Court in support of the statement quoted show the limitations of the doctrine. For instance,

> *Louisville & Nashville R. R. Co. vs. West Coast Naval Stores Co.*, 198 U. S., 483,
> *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585.

The first of these cases held that a railroad company could not be compelled to share the use of a wharf which it had constructed for its own convenience with another competing carrier, the Court saying (page 495):

> "We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation."

In the second of these cases a state statute requiring railroad companies to transport coal at a merely nominal remuneration was held invalid. The Court say (page 595), that the State may enforce, within the limits of its jurisdiction, the public duties of a common carrier, but that,

> "The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

The lengths to which the regulation of business, which does not involve the use of public property or service to the general public, may be constitutionally carried is shown by the following cases.

Brass vs. Stoeser, 153 U. S., 391.

This case sustained a statute regulating grain elevators and declaring all elevators operated for the purpose of the storage of and handling of grain for profit to be public

warehouses, and fixing their charges, notwithstanding that it appeared that the elevator in question was only used for the storage of grain other than that belonging to the owner of the elevator incidently and occasionally; in short that the owner did not hold himself out to, and in fact did not store for the public at large.

> In *German Alliance Insurance Co. vs. Kansas*, 233 U. S., 389,

a statute was sustained providing for the regulation of the business of fire insurance and fixing its rates. The Act was attacked upon the ground that the business of fire insurance was private and voluntary, receiving no privilege from the State, and that insurance rates were necessarily a matter of private negotiation. The Court held, however, that the business was such that regulation was necessary in the public interest. It was contended that the

> "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied,"

and that

> "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist."

The Court say, however, (page 407) that "the distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public in-

terest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle * * * nor has the other contention that the service which cannot be demanded cannot be regulated."

So in

Rast vs. Van Deman & Lewis, 240 U. S. 342,

where a statute imposing a special license tax upon merchants using trading stamps was sustained, the Court say (page 365):

"No refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business."

In

Block vs. Hirsh, 256 U. S., 135,
Marcus Brown Co. vs. Feldman, 256 U. S., 170,

the Court sustained statutes regulating rents, saying in the opinion of the first of the two cases cited (page 154):

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. (Citing cases.) But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. * * * The general prop-

> osition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such interest what at other times or in other places would be a matter of purely private concern."

The Court then quotes a number of cases with the comment that they illustrate that the use by the public generally of each specific thing affected cannot be made the test of public interest, and that they dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair.

It is evident then that if one who carries all goods offered, provided the offeror will sell to the carrier at his own price, may be controlled as a common carrier, as was held in *The Pipe Line Cases,* 234 U. S., 548, so one who uses public property (a highway) to carry for such customers as he selects, may be compelled to carry for all.

In the one case the carrier is required to give up the right to refuse to carry the goods of those who will not sell them to the carrier. In the other case the carrier is required to give up the exclusion from carriage of those whom it does not select as customers.

The legislature is the judge whether the privilege of using the public highways in private transportation for hire shall continue or cease. It might prohibit it alto-

gether. It may and in the present case it has, while not prohibiting its continuance, require that those who conduct it shall in the future permit the public to avail themselves of the facilities for using these highways, that the business equipment of these carriers may afford.

II.

The provisions of Section 3 of the Act are within its title.

The opinion of the judges in the Liberty Highway Company case states (R. p. 32) that as

> "the title to this act has reference only to common carriers, any provisions thereof so broad in their terms as to be applicable also to private carriers are foreign to such title and fall under the condemnation of the Michigan constitutional requirements herein referred to. Such provisions are the provisions of Section 3."

The act was by its title "An Act to regulate and *define* common carriers of persons and property by motor vehicle on public highways of this state." The Court was seemingly of the opinion that the State Legislature could not broaden the common law definition of common carriers so as to include those carrying under special contract.

There can be no doubt that the state has power to regulate the use of its highways by carriers, both public and private, and that it may classify traffic, exempting certain classes from regulation wholly or in part, if the classifi-

cation and exemption be on a reasonable basis. The act in question undertakes to regulate the use of the highways by a certain class of traffic, viz., the transportation of persons or property by motor vehicle for hire on the public highways over fixed routes or between fixed termini. This is clearly stated in Section 1. The attack on the validity of the act now under consideration is not based on a denial of the power to regulate those who, like the plaintiff, carry under private contract, but is based solely on the fact that such carriers are by the act treated as common carriers.

It is obvious that if those engaged in motor vehicle transportation on public highways can avoid the regulation and contribution to the expense of maintenance contemplated by the act, by the device of making special contracts of carriage and refusing to carry otherwise than under such contracts, there will be few who will remain subject to the provisions of the act.

We submit that it was competent for the Legislature to broaden the definition of common carriers on the state highways so as to include those carrying only under special contract, and that it was equally competent for it to require those carrying under such contracts to conduct their business in the future as common carriers. If either of these positions is sound, there is nothing in Section 3 which is foreign to the title of the act.

The constitutional provision invoked has been very often considered in the Supreme Court of Michigan. It has, as that Court says in

Loomis vs. Rogers, 197 Mich., 270,

> "proved a tempting source of attack on the validity of statutes with which parties are dissatisfied, for few laws of any length are enacted where the objection cannot be plausibly urged as to details and auxiliary provisions incidental to the main purpose of the legislation appearing in the body of the act and not itemized in the title."

That a Legislature may by statutory enactment broaden a common law definition does not need argument. The title of the act shows by the expression "define" that the Legislature intended to make common carriers on public highways something different from what at common law would be included in the definition of common carriers.

An Act to *define* common carriers may enlarge the class.

People vs. Bradley, 36 Mich., 447.

The act sustained in this case enlarged the boundaries of a city by annexing to it parts of adjoining townships, the title being "An Act to define the boundaries of the City of East Saginaw and the several wards and election districts thereof." It was claimed that the object was not indicated by the title and that the word "define" does not indicate an intention to enlarge, but merely to make certain what was previously uncertain or indefinite. The objection was overruled. The Court say, (p. 452):

> "While the word "define" may be, and frequently is, used in the sense and for the purpose claimed, and while we might concede such to be the general

and more popular use of the word, yet it is not used exclusively in such a sense. It has a broader and different meaning. It is frequently used in the titles of acts, and but seldom in the narrower sense, or as merely defining powers previously given. An examination of our session laws will show that acts have frequently been passed, the constitutionality of which have never been questioned, where the powers and duties conferred could not be considered as merely explaining, or making more clearly those previously conferred or attempted to be, although the word "define" was used in the title. In legislation it is frequently used in the creation, enlarging and extending the powers and duties of boards and officers, in defining certain offenses and providing punishment for the same, and thus enlarging and extending the scope of the criminal law. And it is properly used in the title where the object of the act is to determine or fix boundaries, more especially where a dispute has arisen concerning them. It is used between different governments, as, 'to define the extent of a kingdom or country.' Indeed, it is a word of very frequent and very general use, and although even the settlement of a disputed boundary must necessarily and inevitably extend the line and take in new or additional territory, within the understanding of one of the claimants, we have never heard of any question being made as to the want of authority to enlarge the possessions of another under a power given to define them."

In *Kurtz vs. People,* 33 Mich., 279, a liquor law passed under the title of "An Act to prevent the sale or delivery

of intoxicating liquors, wine and beer, to minors, and to drunken persons, and to habitual drunkards; to provide a remedy against persons selling liquor to husbands or children in certain cases" was held properly to include a provision that all saloons shall be closed on Sunday and within certain hours at night upon week days and that no sales should be made to anybody within those times. A conviction for such a sale was sustained against the objection that the prohibition of such sales was not within the title.

III.

The remaining provision of Section 3 subjecting carriers under the act to all laws of the state regulating transportation by other common carriers so far as applicable is not invalid for indefiniteness.

The Court's opinion upon this point (see Liberty Highway Company case, Rec. p. 35) was predicated on *Kinnane vs. Detroit Creamery Company,* 255 U. S., 102, which was based on *United States vs. Grocery Company,* 255 U. S., 81. In this case, Section 4 of the Food Control Act, passed by Congress in 1917, commonly known as the Lever Act, which made it unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessaries and to exact excessive prices for necessaries, was held to be invalid because it did not fix an ascertainable standard of guilt and was inadequate to inform persons accused of violation thereof of the nature and cause of the accusation against them.

But in the present case the objection made is not that the penal provisions of the other acts regulatory of common carriers (to which by Section 3 carriers under this act are made subject) do not fix an ascertainable standard of guilt for the offenses which they create. The objection rather is that the statute under consideration does not in Section 3 or elsewhere specify the other acts regulating common carriers which are to apply to carriers under this act, but that it merely states that "so far as applicable" all other acts regulatory of common carriers shall apply to them. The objection then is not that the statutes made applicable are indefinite in their provisions, but that it is uncertain what statutes are applicable. Obviously if a prosecution were brought against any carrier under the act for violation of any of the provisions of any statute regulating carriers, the question could be raised whether that statute was or was not applicable, a question of construction. If held applicable, the question whether its provisions fixed an ascertainable standard of guilt might also arise, but no such question is involved in this case.

Similar provisions to this are common in our statutes and the constitutionality of such provisions has never, so far as we are advised, been questioned.

For instance, Act No. 206 of the Public Acts of 1913, which was considered and sustained in *Traverse City vs. Railroad Commission,* 202 Mich., 575 (see p. 579), declares, as stated in that case, that all corporations operating telephone lines doing business in Michigan are common carriers subject to all *applicable* laws regulating transportation of persons or property by railroad companies within the State.

The Michigan Public Utilities Commission, which is one of the defendants in the case at bar, was created in 1919 as successor to the Michigan Railroad Commission. (See Public Acts of 1919, p. 751.)

Section 3 of the constituting act conferred on the Commission the same jurisdiction in all respects as is now held and exercised by the Michigan Railroad Commission *under the laws of the State pertaining thereto.* Section 4, extending the jurisdiction of the Commission to certain public utilities, gives the Commission the same authority with reference to such utilities *as is granted with respect to railroads and railroad companies under the various provisions of the statutes creating the Michigan Railroad Commission.* This statute has been the subject and basis of much litigation, but this objection has never been raised against it.

IV.

A State may require all carriers over its highways, including those engaged in interstate transportation, to protect their patrons by insurance or bond against injuries sustained in carriage upon the highways of the state.

Upon this subject, the Court below says (Opinion Liberty Highway case, Rec. p. 34).

> "Such provisions of the act as are confined in their application to regulation of common carriers in connection with public highways, are not a direct burden upon interstate commerce, even though

> they may incidentally affect interstate commerce, but any provisions which are not so confined constitute an attempt by the state to regulate, and therefore to unduly burden interstate commerce, and they are for that reason in contravention of the Federal constitution, and void. Such provisions are those contained in Sections 3 and 7 of the act. Section 3 has already been referred to. The provisions of Section 7 providing for insurance and for indemnity bonds for the protection of persons and property carried, are a direct burden upon interstate commerce and are for that reason void."

We apprehend that the statement that Section 3 is open to this objection was inadvertently made. It is clearly erroneous.

As to Section 7, its sole purpose and effect is to provide indemnity for injuries sustained in carriage over the state highways. This the Court holds apparently is not a regulation of common carriers in connection with public highways.

The decisions are to the contrary.

> *Nashville, Chattanooga & St. Louis Ry. vs. Alabama*, 128 U. S., 96.

In this case the State statute requiring locomotive engineers to pass an examination for color blindness, the fee to be paid by the employing company, was held properly to apply to engineers engaged in interstate commerce. The Court say (p. 100) that

> "In *Smith vs. Alabama*, this court, recognizing previous decisions where it had been held that it

was competent for the State to provide redress for wrongs done and injuries committed on its citizens by parties engaged in interstate commerce, * * * very pertinently inquired: 'What is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employes of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and property of others liable to be affected by them?' Of course but one answer can be made to these inquiries, for clearly what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent. * * * Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

Western Union Telegraph Company vs. James, 162 U. S., 650.

This case holds it within the power of the State to require a telegraph company to use due diligence in delivery of messages received by telegraph from points outside the State directed to points in the State under penalty for failure so to do. The Court say (p. 660) that the statute is in aid of the performance of the duty of the company that would exist in the absence of any such statute, and is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing the duty.

> "The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

Chicago Ry. Co. vs. Solan, 169 U. S., 133.

This case sustains a State statute, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, as applied to a claim for an injury happening within the State under a contract for interstate transportation. The Court say (p. 137):

> "It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the

> measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions forseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish."

And in conclusion the Court say (p. 138):

> "Its (the statute's) whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

If the State may require the observance of precautions to prevent injury in transportation within its borders of persons or property carried in interstate commerce and may give remedies for injuries received by persons and

property so carried, it may require the interstate, as well as the State, carrier using its highways to secure indemnity to those sustaining such injuries as a condition precedent to the use of the highways.

A question of estoppel which we understand will be raised by the plaintiff may be briefly considered.

Paragraph 19 of the bill (R. p. 3) avers that the plaintiff's sole business is carrying in interstate commerce under special contract, and that he does not hold himself out as transporting for the public generally. The answer of the defendants other than the Railroad Company (R.p.21) states that if these allegations of paragraph 19 are true (which is not admitted), the plaintiff does not come within the regulations prescribed by the Act, and that the Act does not apply to motor vehicles acting as private carriers. The answer of the Railroad Company, the intervening defendant, (not admitting paragraph 19 of the bill) avers that the purpose of the Act was the control of public highways in the transportation of persons and property for hire by all motor vehicles running over fixed routes or between fixed termini, including those who like the plaintiff (according to the averments of paragraph 19 of the bill) carry under special contract only and do not hold themselves out to carry for the public generally. It avers further that the Act as applied to that class of carriers is valid. (R. pp. 26 and 27.)

We understand that the plaintiff claims that the defendants other than the Railroad Company, who are the public bodies and officials charged with the enforcement of this statute, are estopped by the admission in their

answer from now contending that the Act applies to those who like the plaintiff carry under private contract only; that is, that because their counsel, when the answer was drafted, adopted a construction of the statute now believed to be erroneous, they are estopped from now asserting and contending for a different construction.

It is not claimed that either the plaintiff or the court were misled in any respect by this admission, or that the plaintiff on that account took a different position than he otherwise would have taken.

There is no estoppel by an admission of law arising out of an undisputed state of facts.

People vs. The Pittsburg, Ft. Wayne & Chicago Railway Company, 244 Ill. 166.

Of the two principal questions in the case, that upon which it was decided, was whether a certain city ordinance requiring the elevation of the defendant's tracks caused a vacation of the street and a reverter of the fee to the plaintiffs. The Court held (see p. 170) that there was no such vacation and reverter as a result of the ordinance. The defendants' answer however had admitted that upon the completion of the enbankment upon which they were to lay their tracks, there would be a vacation under the ordinance. After a decision in favor of the defendants, they asked leave to amend by striking out the admission which was denied. It was contended, therefore, by the plaintiff (see p. 171) that defendants were barred by this admission and cannot be heard now to deny the vacation of the street. Overruling this contention, the Court say:

"The admission was one of law and not of fact. It was not made to deceive, and did not deceive or prejudice, plaintiffs in error. They were not induced by it to do or omit to do anything they would have done or omitted had the admission not been made. The admission had no influence upon the decision of the chancellor, for, notwithstanding the admission, the finding was for the defendant and the bill was dismissed. Parties cannot, by their admissions of law arising out of an undisputed state of facts, bind the court to adopt their view. They may, where the admission was made through fraud or where it induced the opposite party to assume a position he would not have assumed had the admission not been made, estop themselves from afterwards denying it. But such was not the case here. Plaintiffs in error were not prejudiced or in any way deceived or injured by it. They knew the facts upon which the admission was based as well as defendants in error knew them. The only effect of the admission was advantageous to plaintiffs in error. Under this state of the case neither the parties nor the courts are bound by such admission."

In support of this decision were cited two earlier Illinois cases, *Holcomb vs. Boynton,* 151 Ill., 294, and *Siegel, Cooper & Co. vs. Colby,* 176 Ill., 210. In the first of these cases, the court held that one who under a mistaken view that a judicial sale was valid, redeemed therefrom, was not estopped from afterwards contending that the sale was void, because the facts were equally known to all parties and because the other parties were not de-

ceived or caused to act differently by what he did. In the second case, the same principle was applied, holding that one who in previous litigation had set up in his answer the claim that a certain lease did not expire until December 31st, 1891, was not thereby estopped from claiming in a subsequent suit between the same parties that the lease did expire at an earlier date.

There can be no estoppel against contending for one construction of the law by previous admission of a different construction, unless some prejudice to the opposite party to the litigation appears to have resulted from his action on such admission.

We submit that the order granting an injunction to restrain the enforcement of this statute against the plaintiff and his business should be reversed.

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UNITED STATES OF AMERICA

SUPREME COURT

CORAL W. DUKE, doing business as Duke Cartage Company,
Plaintiff and Appellee,
vs.
MICHIGAN PUBLIC UTILITIES COMMISSION, et als.,
Defendants and Appellants.

REPLY BRIEF FOR APPELLANTS

Both in this case, and in the Liberty Highway Company case, argued on application for an injunction at the same time, multifarious questions were raised involving the constitutionality of the entire statute (Act No. 209 of the Michigan Public Acts of 1923), but the act was sustained except sections 3 and 7. The injunction was denied in the Liberty Highway case, and was granted in the case at bar. The entire discussion of the general validity of the act and the principal discussion of the questions on sections 3 and 7 are in the opinion in the Liberty Highway case, (reported 294 Fed. R. 703) which, by stipulation is included in the record (R. p. 29).

Our original brief dealt only with the questions arising on sections 3 and 7 of the Act. Appellee's brief is

almost entirely devoted to propositions going to the general constitutionality of the Act.

The first proposition, however, (Appellee's brief, p. 2) is that aside from constitutional questions, the injunction was granted in the exercise of the court's discretion, and should not be disturbed upon appeal.

I.

In discussing this point, Appellee's counsel claims (Brief, p. 2) that the answer of the State (that is, of the defendants other than defendant Railroad Company) admits that the Act in question does not apply to private carriers, which is true (see our original brief, p. 36). But Appellee ignores the fact that the answer of the defendant Railroad Company (R. p. 27) averred that the Act does apply to those who like the plaintiff are carrying under special contract, and that the Act as so applied is valid. Appellee's brief contains the further statement (Brief, p. 4), that:

> "In court the plaintiff's counsel admitted that the Act was not applicable to a private carrier, and that if plaintiff was one 'he is entitled to the relief prayed for, that is, entitled to the temporary injunction, and later a permanent injunction."

Also that:

> "At the hearing on the order to show cause, counsel stated during the argument that the Act was not to be applied to common carriers."

Neither of these statements finds any support in the record.

The court, in its decision, (R. p. 28) assumed plaintiff to be a private carrier, and held that any provisions of the act so broad in their terms as to be applicable also to private carriers are foreign to the title of the act and fall under the condemnation of the Michigan constitutional requirements, but that these provisions are "independent of and separable from those that apply to common carriers, and their invalidity does not affect the remainder of the act."

The court found sections 3 and 7 of the act unconstitutional and, therefore, bad, but that the rest of the act was good. There is nothing in the opinion to indicate that the admission by some of the defendants that the act did not apply to those carrying under private contract had any influence upon the decision. Indeed the court could not have decided on that admission when one defendant averred that the act did apply to carriers under private contract. The only question for decision was that of constitutionality. If the act cannot under the provisions of the State Constitution apply to carriers under private contract, the plaintiff (assuming him to be a private carrier) was entitled to an injunction restraining its enforcement against him. If it does apply to such carriers, and is not invalid on general constitutional grounds, the injunction should have been denied.

Passing now to the general constitutionality of the act, appellee's brief discusses six propositions, numbered from 2 to 7. Of these in their order.

II.

The second proposition is that the act is discriminatory and invalid both under the Constitution of the United

States and that of the State of Michigan (Appellee's Brief, p. 5). The ground of invalidity asserted is in substance:

That by regulating the business only of those who transport for hire and over fixed routes the act discriminates in favor of those having no fixed routes and those who transport only their own goods, and that this is improper class legislation.

This proposition was discussed by the trial court in the fourth section of its opinion in the *Liberty Highway case* (R. pp. 34 and 35). The court concludes:

> "The statute is not class legislation because it applies only to common carriers operating over fixed routes. It is well known that commercial motor vehicle transportation and highway maintenance expense resulting therefrom, is rapidly increasing; that traffic on main highways is greatly congested. It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property and greater damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, it being settled that every state of facts sufficient to sustain a classification which can be reasonably conceived of as having existed when the statute was enacted will be assumed by the Court."

Under the authorities it is clear that the present act makes no improper discrimination.

Northwestern Laundry Co. vs. City of DesMoines, 239 U. S. 486.

This was a bill to restrain the enforcement of a city ordinance making the emission of dense smoke in certain portions of the city a public nuisance. The ordinance in question was passed under a Statute which made the emission of dense smoke within the limits of cities of 65,000 inhabitants a nuisance. The court say, (p. 495), on the question of arbitrary classification:

> "The ordinance applies equally to all coming within its terms and the fact that other businesses might have been included does not make such arbitrary classification as annuls the legislation. Nor does it make classification illegal because certain cities are included and others omitted in the Statute."

Rast vs. Van Deman & Lewis, 240 U. S. 342.

This was an attack upon a Florida Statute imposing license taxes on merchants, including a higher tax upon merchants who offered to customers profit-sharing coupons and trading stamps. The act was sustained, and the court say (p. 357):

> "The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. * * * * The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it. * * * It makes no difference that

> the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."
>
> *Armour & Co. vs. North Dakota*, 240 U. S. 510.

The decision in this case sustained a North Dakota statute requiring lard not sold in bulk to be put in containers holding a specified number of pounds, net weight, or even multiples thereof, and so labeled. The Court say (p. 513):

> "If a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature and there is no impeachment of such estimate in differences of opinion, however, strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them or be convinced of the wisdom or adequacy of the laws."

And again on page 516:

> "The equal protection clause of the Fourteenth Amendment is invoked by the Armour Company, and the specification is that the law under review 'arbitrarily and without reasonable ground therefor singles out lard from all food products which are sold in packages, such as 'prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form are not included and no natural and reasonable ground for excluding them and singling out lard has been suggested.'

> The range of discretion that a State possesses in classifying objects of legislation we may be excused from expressing, in view of very recent decisions. The power may be determined by degrees of evil or exercised in cases where detriment is specially experienced. * * * The law of North Dakota does not exceed this power."

German Alliance Ins. Co. vs. Kansas, 233 U. S. 389.

A Kansas statute providing for the regulation of insurance companies was in this case sustained against the objection that it discriminated against other companies by exempting from its provisions farmers' mutual insurance companies organized under the laws of the State and insuring only farm property. (See pp. 417-18).

Chicago R. I. & P. Ry. Co. vs. Kansas, 219 U. S. 453.

This case sustains a statute regulating railroads which excepted railroads less than fifty miles in length. (See pp. 464-466).

Assaria State Bank vs. Dolley, 219 U. S. 121.

The Kansas Bank depositors guarantee fund act was sustained against the objection of improper discrimination based, among other things, upon the fact that depositors were given preference over other creditors, and that unincorporated banks and banks not having a surplus of ten per cent. went discriminated against. (pp. 126 and 127).

Engel vs. O'Malley, 219 U. S. 128.

In this case a New York statute forbidding individuals or partnerships to engage in the business of receiving deposits of money for safe keeping or for transmission to another country without a license from the State Comptroller was sustained against the objection of unconstitutional discrimination. The Act did not apply to corporations or bankers organized under the State banking law or to national banks, to express or telegraph companies or to individuals or partnerships where the average amount of each sum received in the ordinary course of business shall have been not less than $500 during the preceding fiscal year, nor to those who give bonds approved by the Comptroller. Commenting on this objection the Court say, (p. 138) that:

> "Legislation which regulates business may well make distinctions depending upon the degree of evil * * * It is true no doubt that where size is not an index to an admitted evil the law cannot discriminate between the great and small, but in this case size is an index. Where the average amount of each sum received is not less than $500 we know that we have not before us the class of ignorant, helpless depositors, largely foreign, whom the law seeks to protect."

Murphy vs. California, 225 U. S. 623.

Here an ordinance was sustained prohibiting the maintenance of billiard rooms, but excepting hotels having twenty-five bedrooms and upwards maintaining billiard tables for the use of regular guests only.

Williams vs. Arkansas, 217 U. S. 79.

Here a statute was sustained prohibiting drumming or soliciting for business on trains, for hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeons, and other medical practitioners. The Court quote with approval from the opinion of the State supreme court the statement that "the class of drummers or solicitors mentioned in the Act are doubtless the only ones who ply their vocation to any extent on railroad trains" (p. 90).

Terminal Taxicab Co. vs. District of Columbia, 241 U. S. 252.

It appeared by this case that the Public Utilities Act of the District of Columbia declared public utilities to include common carriers, and defined that as including express companies and every corporation controlling or managing any agency or agencies for the conveyance of persons or property within the District of Columbia for hire, with certain exception. Such companies were placed under the jurisdiction of the public utilities commission. The plaintiff (which contested the commission's jurisdiction) was in the business of carrying passengers and goods by automobiles and taxicabs, including the carriage of passengers between railroad terminals and hotels under contracts with the hotels, but limiting this service to hotel guests. The Court say (p. 255) that this limitation does not remove the public character of the service, and that neither its contract nor its public duty would allow the plaintiff arbitrarily to refuse to carry a guest upon demand. That the service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. The Court say further on page 257 that complaint was made that jurisdiction has

not been assumed by the Commission in their orders over some concerns standing on the same footing as the plaintiff, as to which the Court say that the ground alleged by the Commission is that it did not consider that the omitted concerns did business of a sufficiently large volume to come within the meaning of the Act, and that there is nothing to impeach the good faith of the Commission or give the plaintiff just cause for complaint.

Barrett vs. Indiana, 229 U. S. 26.

Sustains a statute which regulated coal mines, including bituminous mines, but excluding block coal mines. The Court quotes with approval (p. 30) from a former decision the statement that before a court can interfere with legislative classification it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

McLean vs. Arkansas, 211 U. S. 539.

Sustains a statute regulating coal mines which exempted from regulation mines in which less than ten miners were employed.

Fifth Avenue Coach Co. vs. New York, 221 U. S. 467.

Plaintiff had operated stage lines upon Fifth Avenue in New York and had used the interior for the display of advertising signs for years, and later used the exterior of its stages for display advertising. It complained of a city ordinance prohibiting advertising wagons on the streets of the Borough of Manhattan, permitting however, the putting of business notices on ordinary business wag-

ons not used mainly or merely for advertising (pp. 478-480 and 482). The ordinance was sustained.

It sufficiently appears from the cases of *Engel vs. O'Malley*, 219 U. S. 128, and *Williams vs. Arkansas*, 217 U. S. 79, above cited, that size may be a proper basis of classification, and, therefore, the classes of traffic which produce an inconsiderable effect in the production of evils sought to be remedied (in this case, those having no fixed routes, and those transporting only their own goods), may be excepted from the operation of the statute without unconstitutional discrimination.

Appellee's brief upon this point cites (pp. 6 to 12) only certain cases from state courts. Of these one only requires notice. *Kellaher vs. Portland*, 57 Ore., 578. The city ordinance in that case was held invalid because, and only because it taxed animal drawn vehicles used by the owners thereof in their own business, and did not tax automobiles so used (see p. 584 of the opinion where the court say):

> "It is an arbitrary classification to say that an automobile used in the streets for the same purposes as those vehicles drawn by horses which are taxed shall pay no vehicle tax."

The Supreme Court of Michigan is in accord with the other courts upon whose decisions we rely.

> *Lundstrom vs. Township of Ellsworth*, 196 Mich. 502.

This case sustained an act relieving townships from liability for damage resulting from breakage of a bridge by any steam vehicle weighing over six tons. The act was

attacked as improper class legislation. The court say (pp. 508, 509):

> "Class legislation is unconstitutional only when shown to be unreasonable, arbitrary and capricious, * * * unless upon its face convincingly arbitrary, capricious and unreasonable, it is not for the courts to debate the policy and wisdom of such legislative treatment. It was early said by this court, and has been reiterated, that : 'In cases of doubt, every possible presumption, not clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the act. ' "

III.

Appellee's third proposition (Brief, p. 13) is that Act 209 is a law impairing the obligation of contracts. The point made is that :

> **Inasmuch as the plaintiff has paid the license tax provided by the General Motor Vehicle Act (which act provides that such payment exempts the motor vehicle from all other taxation) a contract results which is violated by the imposition of the tax under the act here in question.**

Appellee's brief states (p. 14) that he complied with the requirements of the General Motor Vehicle Act, "Paying for his trucks taxes in the amount of approximately $4,100.00 for the license year January 1, 1923 to December 31, 1923." This statement is hardly warranted by the record, which contains nothing but the statement in paragraph 40 of plaintiff's bill of complaint (R. p. 15):

> "That plaintiff has complied with the provisions of the law of the State of Michigan relative to motor vehicles and the operation thereof and conspicu-

ously display (on their said motor equipment) their state license motor vehicle numbers."

Now, Act No. 128 of the Public Acts of 1923 (Public Acts, 1923, p. 188) amended section 7 of the Motor Vehicle Act (the original language of which, quoted on page 14 of Appellee's brief, and upon which he relies, is that the tax provided for shall be "All the lawful tax collectible on such motor vehicle, and shall exempt such motor vehicle from all other forms of taxation,") by adding after the words above quoted the following: "Except that the legislature may impose further and different specific taxes or privilege fees on certain classes of such motor vehicles." This amendatory act by its second section (see p. 189) "Is ordered to take immediate effect", and being approved May 10, 1923, took effect on that date.

Now Appellee's bill of complaint does not show that he paid his tax *before* May 10, 1923, and there is nothing in the record to show when he paid it. If he did not pay before May 10th, the exemption which he claims was taken away by the amendatory act which took effect upon that day, and which permitted the imposition of the privilege fee by the act here complained of. He is not in a position to claim that his payment made a contract.

Furthermore, by section 6 of the Motor Vehicle Act, it is provided (1 Mich. Comp. Laws, 1915, Sec. 4802): "All registrations under this act shall expire on December 31st of each year, and shall be renewed annually in the same manner and upon the payment of the same tax as provided in Section 7." The exemption from further taxation if acquired (on the assumption, not warranted by the record, that his tax was paid before May 10, 1923) expired December 31, 1923. It would in that case be true

that the privilege fee provided for by Act No. 209 could not be exacted from plaintiff for the year 1923, but, as his exemption is for the year only, he would be liable for the payment of that privilege fee for 1924, and for succeeding years should he continue in business. The act would not be unconstitutional as applied to plaintiff because of the existence of an exemption, for a limited time, from the payment of the privilege fee for which it provides.

IV.

Appellee's fourth and fifth propositions may be discussed together. They are that Act 209 deprives him of property without due process of law, and interferes with his liberty of contract. That is, (Appellee's Brief, pp. 19, 21 and 22) that

Because his entire business is the transportation of automobile bodies under special contracts with certain automobile manufacturers, he cannot be required, as by the act in question he is required, to carry for the public generally.

It appears by the bill of complaint and plaintiff's affidavit (Bill, par. 19, R. p. 3; Affidavit, R. p. 19) that the appellee's entire business is the transport of automobile bodies under special contracts. It does *not* appear there or elsewhere in the record, although it is asserted (Appellee's Brief, p. 22) that he "could not possibly carry for the public generally", and that "He has only the equipment necessary to carry for the output of these factories". For anything that appears in the record it may well be that his equipment is adequate for other transportation besides that called for by his existing contracts. Nor does the record show that even these contracts were made before Act No. 209 took effect.

Appellee's entire argument on this point is based on two propositions:

(a) That he has only the equipment necessary for the transportation required by these contracts.

(b) That if he be required to carry for the public generally, he cannot carry under the contracts.

The second proposition depends on the first, and that has no basis in the record. Nor is it true (see our original brief p. 18) that, if made a common carrier by law, plaintiff is obliged to abandon his existing contracts.

Furthermore even contract rights may be modified in the public interest under the police power.

Atlantic Coast Line vs. Goldsboro, 232 U. S. 548.

The Court say in this case (p. 558) that it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise.

Tanner vs. Little, 240 U. S. 369.

In this case a law prohibiting the use of trading stamps without the payment of a high license fee was sustained. It appeared that a number of the complainants had contracts running from one to five years now in force and which were in force at the passage of the Act, for the

use of a trading stamp advertising system; and that they had a large number of stamps upon which they will sustain a great and irreparable loss if they cannot dispose of them. (See p. 371). The license fee was admittedly prohibitive. (See pp. 380 and 386). The statute was sustained against the objection that it impaired the obligation of contracts.

Union Dry goods Co. vs. Georgia Public Service Corporation, 248 U. S. 372.

The State Railroad Commission, under statutory authority, made an order raising rates for supplying electricity by public service corporations to a point higher than provided in an unexpired contract made prior to the order. Held that the order was a valid exercise of police power.

The Court say, p. 375, "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." After citing several cases in point, the opinion continues, quoting the case of *Railroad Company vs. McGuire*, 219 U. S. 549.

> "There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of

the community." After other citations, the opinion concludes:

> "These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State."

V.

Appellee's sixth proposition (Brief, p. 22) is that the act in question is in conflict with the commerce clause of the Federal Constitution:

Because the fee which it exacts is a direct tax on the privilege of engaging in interstate commerce; that the insurance requirement of section 7 is invalid for the same reason.

The objection to section 7 is sufficiently discussed in our original brief, pages 31 to 36.

The fee imposed by the act (see Sec. 8, set out in our original brief, p. 4) is not a tax on the privilege of engaging in interstate commerce. It is, in the language of Section 8, "a fee for the privilege of engaging in the business defined in Section 1 hereof." The business defined in Section 1 (see our original brief p. 2) is, "The business of transporting persons or property by motor vehicle for hire *upon or over the public highways of this state* over fixed routes or between fixed terminii." The user of the state highways is the essential element upon which the tax is based. It is not the business of transporting persons or property by motor vehicle for hire (whether in interstate or intrastate commerce) the privilege of doing which is taxed, but the user of public highways in such transportation.

There is urgent need in the interest of public safety and public convenience for the regulation of the use of the highways which the act seeks to regulate. The following cases sufficiently show that the provisions of the act are well within the limits of the police power of the state.

Hendrick vs. Maryland, 235 U. S. 610

In this suit the Maryland Motor Vehicle License Act was sustained. It provided that all motor vehicles should be licensed by a State official; provided for fees, to be used in the maintenance of State roads, and contained various other regulatory provisions. It was attacked as a regulation of interstate commerce. The Court say, (p. 622) that the movement of motor vehicles over highways is attended by constant and serious dangers to the public and is abnormally destructive to the ways themselves; that it is a proper subject for police regulation and that in the absence of national legislation a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation of all motor vehicles, including those moving in interstate commerce.

Kane vs. New Jersey, 242 U. S. 160.

This case sustained the New Jersey automobile license law which provided that every resident of the state and every non-resident whose automobile shall be driven in the state, shall before using it on the public highways register it and pay a specified fee which fees are to be used for the repair of the improved roads throughout the state.

The Court say (p. 167) that the power of the State to regulate the use of motor vehicles on its highways extends

to non-residents as well as to residents, and includes the right to exact reasonable compensation for special facilities afforded, as well as reasonable provisions to insure safety. On page 169 (stating that both the New Jersey and the Maryland Act contemplated that the excess fees collected over expenses should be applied to the maintenance of improved roads) the opinion quotes from *Hendrick vs. Maryland* the statement that the Act "was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

Mountain Timber Co. vs. Washington, 243 U. S. 219.

This case sustained a Workmen's Compensation Act which provided for the creation of a public fund for the indemnification of injured employees and their dependents by the compulsory contribution of employers in industries classified as extra hazardous. (See p. 229).

The Court say (p. 244) that "the Act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations," and that "the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed irrespective of the particular plant in which the accident might happen to occur. In short it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or

work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation."

They refer in support of this position to *Hendrick vs. Maryland* and *Kane vs. New Jersey* as sustaining laws framed to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. (See p. 245).

This question is discussed in the opinion of the trial court (R. pp. 32 and 33), with the citation of numerous authorities. The court holds that the fee provisions of the act are not in conflict with the Federal Constitution.

VI.

Appellee's seventh proposition (Brief, p. 23) is that Section 3 of Act 209 is too vague and uncertain to furnish a sufficiently definite standard of guilt. This proposition is sufficiently discussed in our original brief, pages 29 to 31.

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UNITED STATES OF AMERICA

THE SUPREME COURT OF THE UNITED STATES

CORAL W. DUKE, doing business as the Duke Cartage Company, a citizen of the State of Michigan,
Plaintiff and Appellee,

vs.

MICHIGAN PUBLIC UTILITIES COMMISSION, et al.,
Defendants and Appellants.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

In Appellant's statement of the case, on page 8 of the Appellant's brief it is stated that

> "It was argued also for the plaintiff, though the point was not passed on by the court, that to make those carrying under private contracts common carriers was the taking of private property without compensation, in contravention to the 14th amendment to the United States Constitution."

It should be said that it was also argued to the court that Act No. 209 of the Public Acts of the State of Michigan for 1923 was void, invalid and unconstitutional for

each of the reasons alleged in plaintiff's Bill of Complaint, as found in paragraphs 27, 28, 29, 30, 31, 32, 33, 35, 37, 39 and 40. (See transcript of record, pages 7 to 15).

This appeal is a review of the propriety of issuing a temporary injunction in the court below on the case presented by bill and answers, and the argument to show cause why such a temporary injunction should not issue.

ARGUMENT

I.

Aside from the Constitutional Questions Involved, the Decree of the Court Granting a Temporary Injunction and the Discretion Exercised by Them Cannot be Disturbed on Appeal, in View of the Situation Before the Lower Court at the Time of the Hearing and Decision Granting the Temporary Relief.

It is difficult to see how the case at bar be reversed on this point in view of the position of the state in the record in its answer. On page 24 of the record in this appeal (pars. 41 and 42) the state says that Act 209 "does not apply" to a private carrier and that such carrier "will not be affected in any manner" as the plaintiff feared. In the next paragraph (42) (Record p. 24) of the state's answer, it is announced as the state's position that "if plaintiff is operating solely and exclusively as a private motor vehicle carrier (and on this appeal this fact is admitted) *he does* not fall within the provisions and conditions of said Act No. 209 of the Public Acts of the State of Michigan for the year 1923—and that the provisions of said act will not be enforced against him and will not result in any prosecution or proceeding against said plaintiff, as set forth in paragraph

42 of Plaintiff's Bill of Complaint. Wherefore, defendants state that if plaintiff is solely and exclusively a private carrier of motor vehicle, *he is entitled to the relief prayed in paragraph 2 of his prayer* (this was the prayer for a temporary injunction) *for relief* * * *

The intervenor, representing a competitive carrier by electric railway, now seeks to disturb the propriety of the lower court in granting the temporary injunction on this state of facts. Was there an abuse of discretion in granting the writ under these circumstances? The enforcing authorities of the state utilities commission were enforcing the act against plaintiff's vehicle, (see paragraphs 21 and 24 of Bill, Record p. 6).

The commission by its attorneys in court admit that the act has no application to private carriers. Plaintiff Duke was a private carrier. He was also exclusively engaged in interstate commerce. No question is raised about the authority of the Attorney General of the State of Michigan to appear and represent the Michigan Public Utilities Commission in the District Court.

This court may deal with this situation if it choose and the case may go off on this as well as on any of the constitutional questions involved. On an appeal direct to the Supreme Court from an order of the three judges on an application for new interlocutory injunction pursuant to Section 238 of the Judicial Code—the Supreme Court has jurisdiction to review the whole case.

Van Dyke vs. Geary, 244 U. S. 39, (42).

The intervenor attempts to meet this situation by the use of a case found in 244 Illinois 166. It need only

be said that it appears from the opinion that the admission in that case as said (on p. 171 of 244 Ill.) "had no influence upon the decision of the chancellor, for notwithstanding the admission the finding was for the defendant and the bill was dismissed." In the case at bar the state officers were enforcing the act against plaintiff. In court the plaintiff's counsel admitted that the act was not applicable to a private carrier and that if plaintiff was one "he is entitled to the relief prayed for"—that is, entitled to the temporary injunction, and later a permanent injunction. At the hearing on the order to show cause counsel stated, during the argument, that the act was not to be applied to common carriers. How can it be said that within the meaning of *People vs. P. St. N. & C. R. Co.* 244 Ill. 166 (171) that this situation and admission, had no influence upon the decision of the chancellor?

The court found for the plaintiff and issued the temporary injunction and this is an appeal from the discretion exercised in so doing.

Also under the position taken in appellant's brief the case would not support his position. The holding in his Illinois case was based on "an undisputed state of facts" (p. 171 of 244 Illinois supra). Counsel, in his brief on this point filed in this court on p. 36 expressly says that it is not admitted that plaintiff is a private carrier. He disputes the fact. If this is so he may not properly present the above case, the holding of which is plainly conditioned (among other things) on an undisputed state of facts. (See also p. 37 of Appellant's Brief on this point).

PROPOSITION II.

Act 209 of 1923 is Discriminatory and Invalid Under the Constitution of the United States as Well as of the State of Michigan.

We assume it to be settled that a taxing measure must have some reasonable basis for the classification which it adopts. In the application of the tax, it is our contention that the arbitrary imposition of the status of common carrier upon plaintiff, Coral W. Duke, doing business as Duke Cartage Company in the case at bar, actually discriminates against him in favor of others who make the same use of the highways and whose vehicles damage the highways to the same, or to a greater extent.

Because the plaintiff under private contract carries automobile bodies between Detroit and Toledo for hire he is made by the act a common carrier and must pay a tax in his case amounting to $5,000 over and above his previous taxes, for the privilege of so doing. An automobile body manufacturer of Detroit on the other hand who chooses to carry his own bodies from Detroit to Toledo is not a common carrier within the meaning of the Act because he does not carry for hire, but carries his own bodies. He may carry the same freight over the same highways in the same trucks (or in heavier trucks) and with the same or greater use of the highways and damage thereto, as the plaintiff, and yet he is exempted from the payment of the tax. There is nothing in reason to place him in a different position. Counsel for the state at the argument (and now in the brief here) expressly put the basis of the classification in the statute as an aim to reach those who make

use of the highways of the state with heavy vehicles which damage the road. How, then, may a carrier be taxed under the Act and a manufacturer doing the same business be free without tax? Viewed from this standpoint and under the state's admission of the ground and classification used in the Act, the Act, within the meaning of the protective clause of the Federal and State Constitutions is arbitrary, unreasonable and does not operate uniformly upon those in the same condition.

A discrimination very similar to the one made by Act 209 was held void in *Kellaher vs. Portland,* 57 Ore., 578; 112 Pac., 1076.

A city ordinance laid a tax on the privilege of using the streets on all owners or keeper of any wagon, automobile or other vehicle used for the conveyance of persons or goods or for any other business, as follows, naming a list of vehicles including every vehicle used for business purposes drawn by horses; and of automobiles, *only those used for hire;* omnibuses used in transporting passengers without hire. This was held invalid and void for discrimination, in that it does not include automobiles used by the owners in their own business and not for hire, while vehicles drawn by horses *and used in the same way* are taxed. The court said the classification is arbitrary and not made on a reasonable basis. In the case at bar the exemption of motor trucks of a manufacturer, traveling over the same highway or highways or routes, and carrying the same equipment and load is illegal. The law does not apply uniformly to the class who use the highways by hauling freight in automobile trucks, only those who do so for hire, i. e. for others—must pay the tax and obtain the permit.

In the *Kellaher case* the court said:

> "Classification is for the determination of the legislature provided it is made on some reasonable basis and applicable to all similarly situated, without discrimination."

The Act taxed automobiles for hire, but omitted from its terms automobiles used in connection with the owner's business. As to this the court said (page 1078 of 112 Pac.):

> "However, we are unable to uphold the classification which omits from its terms automobiles used in connection with the owner's business which we are justified in assuming as a matter of common knowledge includes a large number of automobiles used by department stores, brewers, groceries, express companies, physicians and others not used for hire, and are in the same class as those taxed by the ordinance."

And this court may assume as a matter of common knowledge that all those motor vehicles operated over the highways of Michigan by corporations owning them, are in the same class as those taxed by 209 of 1923 and within the same reason for regulation so far as the use of highways is concerned.

Oil companies, creameries, bakeries, manufacturers, in their own vehicles, although not strictly for hire, carry goods over the high ways of the state day in and day out and over the same routes between villages of the state. These are admitted not to be within the purview of the Act. But where is the basis of reasonableness for such

an exemption, having in mind the purpose of the act? Wherein can it be said to meet any of the fundamental requirements of permissive classification? It is unjust, discriminatory and illegal.

The following cases, decided by the Michigan supreme court, held the acts there in question, unconstitutional as discriminatory class legislation.

In *Haynes vs. Lapeer Circuit Judge,* 201 Mich. 138, there was involved "an act for the sterilization of mentally defective persons maintained wholly or in part by public expense and public institutions in this state." The act was held void, the court saying:

> "Conceding, for the purpose of this inquiry, that such legislation is a proper governmental function and within the police power of the state, the question naturally arises, what logical connection with the object sought by this enactment has a classification *which carves a class out of a class* and applies the proposed curative treatment, which it is found the public weal demands and justifies, only to those of the type requiring such exclusive legislation who, by reason of their sequestration under public control, are presumably helpless to work upon those now in being or posterity the mischief which the law is framed to eliminate?
>
> 'The legislature cannot take what might be termed a natural class of persons, split the same in two, and then arbitrarily designate the dissevered factions of the natural unit as two classes, and thereupon enact different rules for the government of each.' 6 R. C. L., p. 383.

*"In this enactment the legislature selected out of what might be termed a natural class of defective and incompetent persons only those already under public restraint, leaving immune from this operation all others of like kind to whom the reason for the legislative remedy is normally and equally at least, applicable, extending immunities and privileges to the latter which are denied to the former. * * * For the foregoing reasons we are constrained to concur in the opinion of the learned circuit judge that this law as framed does not afford, in its scope, those affected by it that equal protection under the laws guaranteed by the Constitution, and so limits the class of defectives covered by its provisions as to be clearly class legislation without substantial distinction within constitutional inhibition."*

In *Davidow vs. Wadsworth Mfg. Co.,* 211 Mich. 90, is found the following:

"It is a trite expression that classification in order to be legal must be rational; it must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification and reasonably justify a difference of rule. * * * If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination and not classification. *Black vs. State,* 113 Wis. 205; 89 N. W. 522.

'It has been sometimes loosely stated that special legislation is not class if all persons brought

under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike and under the same conditions all who are brought within its influence but in its classification it must bring within its influence all who are under the same conditions.' * * *

Johnson v. R. R. Co., 43 *Minn.* 222; 45 *N. W.*, 156, 8 *L. R. A.*, 419.

'It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class but the classification must furnish a reason for, and justify the making of the class. That is, the reason for the classification must *inhere in the subject matter and rest upon some reason which is natural and substantial and not artificial.' Bedford Quarries Co. v. Bough*, 168 Ind., 671; 80 N. E., 529; 14 L. R. A., (N. S.), 418.

The court in the Davidow case then proceeded:

"We are of the opinion that the statute under consideration constitutes class legislation of the most objectionable kind. The classification is arbitrary and oppressive and without any valid reason for the basis."

In *Peninsular Stove Co. v. Burton*, 220 Mich., 284, the court held a statute to be illegal class legislation. The title to the act read:

"An act to regulate and control the installation of warm air heating plants and to provide for the

public safety and fire protection in such installation."

The act in question was limited to furnaces enclosed in *galvanized sheet iron.*

The court said:

"It is elementary that all property is held subject to the general police power to regulate and control its use so as to secure the general safety and all reasonable provisions enacted for the preservation of and protection against conflagration is generally recognized as a proper exercise of such power. But legislation to that end must not be unreasonable or discriminatory. It must not single out any class of persons or things and arbitrarily impose burdens upon them not applying to others within the same general class.

The records show that there are several kinds of heating plants, steam, hot air, warm air and stoves, in which wood, coal or coke may be used as fuel. Out of these the legislature selected a class, warm air, for this special regulatory legislation. While the title indicates an intention to regulate *all* plants of this class, the first section of the act confines its operation to 'furnaces enclosed in galvanized sheet iron.' Of this class an exception is made of those which are pipeless or have but one register. We have, therefore, not only the selection of a class of heating plant but of a class of this class. To justify such exaction it must appear that some substantial reason existed for the regulation of this particular kind of heating plant not equally

applicable to the others. Is there greater danger of fire from a plant thus installed than from other warm air heating plants? * * *

But it seems clear to us that the classification here made is not based upon any real or substantial distinction. No sufficient reason has been pointed out for exercising the supervisory control provided for in the act over the installation of a warm air heater enclosed in metal with more than one pipe which does not equally apply to one enclosed in brick or one which has but one pipe."

These three cases speak for themselves. We are unable to perceive wherein what was stated by the court therein does not apply to the case at bar. Act 209 purports in its title to apply to all carriers by motor vehicle operating over the highways of Michigan for hire. Assuming such carriers could be a proper class, yet the act itself carves out a class of this class and limits the act to those carriers only operating over fixed routes and between fixed termini. and exempts altogether a manufacturer carrying his own products over the highways of the state whether over fixed routes or not. We can see no reasonable basis for this distinction. The answer of defendants furnishes but one reason therefore of which we will presently speak.

It must be apparent to the court that carriers operating for hire over the highways of Michigan, by motor vehicle, whose business takes them all over the state or goodly portions thereof but not over fixed routes or between fixed points are given immunities and privileges which plaintiffs do not enjoy, and it is impossible for us to conceive any reasonable distinction that justifies this discrimination. If there is a distinction it surely does

not inhere in the subject matter. By the same token it might be claimed that all persons operating motor vehicles over the highways transporting persons or property should be taxed and regulated. In fact, it is difficult to see why they should not be if these operating over fixed routes or between fixed termini should be.

PROPOSITION III.

Act 209 of the Public Acts of Michigan for 1923 is a Law Impairing the Obligation of Contract Contrary to Section 10, Article 1, of the Constitution of the United States, and Section 9 of Article II of the 1908 Constitution of the State of Michigan.

Before the passage of Act 209 of 1923 the state of Michigan was not without regulatory laws concerning motor vehicles including motor trucks, with all of which plaintiff Duke has complied. The list includes Act 368 of 1917 containing detailed regulations for the issuance of a driver's license and providing for an examination and fees; Act 132 of 1917 containing specifications of the maximum weight of trucks operated on the highways, maximum wheel loads, kind of brakes, kind of tires, carrying capacity of axles, height of wheel, speed, etc. Act 8 of 1919, Extra Session, prescribed limitation in the aggregate width and length of trailers, kind of coupling devices, safety chains, lights and hauling poles. None of these acts contained any exemption from further fees or taxes. But we have not come yet to Act 302 of 1915 as amended by Act 383 of 1919. This was the General Regulatory Act of the state applicable to all motor vehicles operating on the highways of the state. The state required

application for registration, the furnishing of complete and detailed information of the make of machine, number and diameter of its cylinders, horse power. The act provided for the issuance of a license which entitled the owner to operate the vehicle on or over the highways of the state for the license year. As a condition precedent to the issuance of the license, the tax provided by the Act were to be paid. In the case of a motor truck this tax was 25 cents per horse power and 35 cents for each one hundred pounds weight. This tax was to quote the language of the Act to be—"All the lawful tax collectible on such motor vehicle and shall exempt such motor vehicle from all other forms of taxation." Sec. 7 of Act 302 of 1915 as amended by Act 383 of 1919.

Plaintiff Duke complied with this Act paying for his trucks' taxes in the amount of approximately $4100 for the license year January 1st, 1923 to December 31st, 1923.

It is plaintiff's contention that the acceptance by Duke of the grant and offer of the state upon the condition of exemption from further taxation, constituted a contract. And Act 209 of 1923 is a law impairing the obligation of the contract by imposing in the license year 1923 (May, 1923), new conditions and further and other taxes upon his motor vehicle which had already been granted a license to operate over the highways of the state for the year 1923. The degree of impairment is immaterial as a matter of law.

In plaintiff's case the increased tax which he was called upon to pay was upwards of $5000, or more than 100 per cent increase.

The legislature may not bind its successors but it may enact a law which may become a contract that a subsequent legislature may not impair.

State Bank of Ohio vs. Knopp, 16 How. 369;
Ohio Life Ins. Company vs. Debolt, 16 How. 416;
Mechanics' Bankers vs. Debolt, 18 How. 380;
Hall vs. Wisconsin, 103 U. S. 8;
Von Hoffman vs. Quincy, 4 Wall. 554.

The situation in this case must not be confused with those cases holding that the mere imposition of a license is not a contract that such license fee will not be increased.

This is not such a case. Act 302 of 1915, supra (which is admitted to be a revenue measure, as well as a licensing regulation) imposed a license fee or tax, but it did more, it expressly covenanted with the licensee that the tax therein exacted was all the tax the state would exact from the owner applying upon the faith of this promise. Relying on it and calculating upon it, plaintiff applied for and received the license to operate his vehicle over the highways of the state. He has entered upon private undertakings for a consideration fixed in part by the amount of the fees paid, which he had a right to assume would be all the fees exacted from him.

This law of 1923, Act 209, clearly impaired the obligation of plaintiff's existing contract with the state and in so doing violated Section 10, Article I of the Federal Constitution as well as Section 9, Article XI of the Constitution of the State of Michigan and is therefore a nullity under either.

Looking at the tax exemption in 302 of 1915 as amended, what was illegal about it? Can a state not pass a valid tax exemption law? Was 302 of 1915 such a law?

A law which within the meaning of this clause in the Federal Constitution impairs the obligation of contract and undoubtedly includes state statutes. *Canada Southern Railway vs. Gebhard,* 109 U. S. 527; 27 L. Ed., 1020. This contract may be either express or implied. *Fiske vs. Jefferson Police Jury,* 116 U. S. 131; 29 L. Ed., 587. Even an enlistment in the state militia has been held to be a contract in the sense that additional burdens may not be imposed after an enlistment. *State vs. Long,* 136 La., 1; L. R. A., 1915-E, 235; 66 So., 377. As before stated the mere grant of a license such as to carry on a profession, or to operate a motor vehicle (*Ruggles vs. State,* 120 Md. 553) may be considered a permission and not a contract and while the mere imposition of a specific tax such as a license (*Bishoff vs. State,* 43 Fla. 67; 30 So. 808) or a privilege tax (*Western Union Telegraph Company vs. Harris,* Tenn. Ch. App. 52 S. W. 748) may not be an implied contract that such tax will not be increased, yet there is no need in the case at bar to resort to implications. Here is an Act of the State which contained in plain language an express exemption from further taxation, at least for the license year 1923. The answer of the state and the argument at the hearing discloses sufficiently that it is the desire of the state by this law to obtain compensation for its large outlays of money on the improvements on the highways of the state—in other words, in addition to being a regulatory or process measure it is also a revenue measure. In *Paige on Contracts,* Vol. 6, Sec. 3668, appears the following language:

"In striking contrast to the unwillingness of the court to permit legislatures to barter away the police power of the state, or to restrain its exercise in any way is their willingness to allow the state to make valid and binding contracts binding its taxing power or providing for exemption from taxation. Where such contracts are found to exist and their existence is clearly established, they are regarded as binding upon the state and the obligation cannot be impaired by subsequent legislation."

Piqua Branch Bank vs. Knoop, 57 U. S. (16 How.), 369;
Dodge vs. Woolsey, 59 U. S. (18 How.), 331;
Mechanics' & Traders' Bank vs. Debolt, 59 U. S. 15 L. Ed. 401 (18 How.), 380;
Jeff. Branch Bank vs. Skelley, 66 U. S. 436;
Woodruff vs. Tropnoll, 51 U. S. (10 How.), 190; 13 L. Ed. 383.

Prior to the imposition of additional taxes for the license year and apparently to circumvent the clear cut tax exemption given to those who had paid the fees under Sec. 7 of Act No. 302 of the Public Acts, Mich. 1915, the Legislature of Michigan amended this Section 7 by Act No. 128 of 1923 by adding the words in italics, as follows:

"Sec. 7. Taxes to be paid prior to registration. The secretary of state shall collect the following taxes before registering a motor vehicle or vehicles, in accordance with the provisions of this act, which taxes shall be all the lawful tax collectible on such motor vehicle, and shall exempt such motor vehicle from all other forms of taxation, *except that the*

> *legislature may impose further and different specific taxes, or privilege fees,* on certain classes of such motor vehicles."

Then Act 209 of 1923 proceeds in addition to the 25 cents per horsepower and 35 cents per hundredweight levied under 302 of 1915 (and paid by plaintiff Duke) to levy an additional $1.00 per hundredweight.

It needs no argument or citation of authority to maintain that it was quite as impossible legally for the state to violate its contract by this device as by the direct violation contained in the later act of the same session, 209 of 1923. The attempt to legalize the additional tax in Act No. 209, by amending 302 of 1915 during the license year 1923, is as objectionable from the constitutional standpoint as Act 209 of 1923 itself. In No. 128 the state says in effect: we may now violate our contract and in No. 209 they do violate it. The declaration of intention adds nothing to the validity of Act 209, and makes no constitutional preparation for it.

PROPOSITION IV.

Act 209 of 1923 Violates the Due Process Clause of the XIV Amendment, and Deprives Plaintiff Duke of Property Without Due Process of Law.

A legislature of a state may determine whether a stream shall be considered a public highway or not—yet if in fact it is not one, the legislature cannot make it so by simple declaration—since if it is private property—the legislature cannot appropriate it to a public use without providing

for compensation. *Cooley on "Constitutional Limitations," Seventh Edition,* page 863; *Morgan vs. King,* 18 Barb., 284; 35 N. Y., 454. Duke is not in fact a common carrier. The legislature in Act No. 209 has declared him to be a common carrier. He must now carry for the public generally—his equipment is now dedicated to this and can no longer be used to prosecute his private business; it is now taken for the public. His business consisted in two valuable and lucrative private contracts with Detroit automobile manufacturers. Plaintiff's property rights in these contracts have a large money value. This law will take those rights from him without compensation—for if he is a common carrier and must carry for all who offer—his equipment will not be available for the said manufacturers. He moves all their product and his obligation, undertaking, equipment and ability to do this is a reason for his possession of this valuable business—these valuable property rights. Thus does this arbitrary imposition of the status of one who is not a common carrier have also the effect as to plaintiff Duke of depriving him of property without due process of law. The legislature may not appropriate his equipment to the use of the public without compensation for the property rights now inseparably connected therewith.

In this connection, counsel respectfully call the court's attention to the case of

Producers Transp. Co. vs. R. R. Commission of Cal., 251 U. S. 228, (40 Sup. Ct. Rep. 131).

In this case the staute declared that a person or corporation operating "any pipe line or any part of any pipe line * * * * for the transportation of crude oil * * * *

directly or indirectly, *to or for the public*, for hire * * * shall be deemed a common carrier." (Stats Cal. 1913 c. 327; Stats Ex. Sess. c. 14). This is quite different from the case at bar where the statute makes any carrier for hire a common carrier and does not contain the saving clause *"for the public"*. (See Sec. 3 of Act 209 of Public Acts 1923, Michigan). And it is to be expressly noted that the opinion says (p. 230 of 251 U. S.): "It is of course true, that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts *and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of the commission, convert it into a public utility or make its owner a common carrier,* for that would be taxing private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

(Citing several cases decided by this court).

The mere fact then, that the pipe line might be constructed and maintained along a public highway of the state would not alone suffice to justify its regulation by an arbitrary imposition on it of a common carrier—if it in fact did not carry for the public.

On page 231 of this case the court also said: "The state court upon examination of the evidence, concluded that the company *voluntarily had devoted the pipe line to the use of the public.* (Italics ours).

It also appeared that it had, in acquiring its right of way, resorted to an exercise of the power of eminent do-

main—permissible only if the condemnation be for public use (Cal. Code Cir. Prac. Sec. 1237-1238) and in that proceeding asserted and obtained a judgment reciting that it was "engaged in transporting oil by pipe line, *as a common carrier for hire,* and that the right of way was sought for a public use," (italics ours) (p. 231 of 251 U. S.)—and the court added (p. 231) " * * * it was apparent that the company did in truth carry oil for *all* producers seeking its service, in other words, *for the public.*" (italics ours).

PROPOSITION V.

Act 209 of 1923 is Void Because it Interferes With the Liberty of Contract Granted to Citizens Within the Meaning of the Fourteenth Amendment to the Constitution of the United States.

The protection of this amendment extends to plaintiff the right to pursue any livelihood or vocation and for that purpose to enter into all contracts necessary and proper for carrying such purposes to a successful conclusion. *Allgeyer vs. Louisiana,* 165 U. S., 589. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the word "liberty" in the Fourteenth Amendment.

Lachner vs. N. Y., 198 U. S., 53.
Coppage vs. Kansas, 236 U. S. 1.
Chicago, etc. R. Co. vs. McGuire, 219 U. S., 549.

Plaintiff chose—lawfully, to make two private contracts with automobile body manufacturers at Detroit, Michigan—by which he would be entitled to compensa-

tion for delivering auto bodies for said factories at Toledo, Ohio. He carries for no one else. He does not and could not possibly carry for the public generally. Act 209 of 1923, by arbitrarily designating him as a common carrier compels him to make other and different contracts with others, with the public, against his will and his ability. It compels him in so doing to forego the profit and benefit of his two private contracts. He has only the equipment necessary to care for the output of these factories. His neighbor may carry these bodies if he be a manufacturer and although doing precisely the same thing in the process, over the same route and in vehicles of the same or heavier type, is yet not, under the terms of the Act, a common carrier. By arbitrarily and unreasonably imposing this status on one so manifestly outside of it, the legislature has deprived plaintiff Duke of property without due process of law. It has deprived him of the right freely to contract within the meaning of the liberty guaranteed to him by the Fourteenth Amendment.

PROPOSITION VI.

Act 209 of the Public Acts of the State of Michigan for 1923 is in Conflict with the Commerce Clause of the Federal Constitution.

Undoubtedly a state may make valid regulations of motor vehicles using its highways by acts and restrictions which may incidentally burden interstate commerce. Act 209, however, is not such an act. It requires the payment of a certain tax or fee which is a direct tax upon the privilege of engaging in it, and a direct charge and burden thereon.

Section 8 of Act 209 of 1923 requires that "Every such carrier shall pay to the commission for the use of the state, or at or prior to the issuance of the permit, *and as a fee for the privilege of engaging in the business* (defined in Section One of the Act) * * * One Dollar for each one hundred pounds weight of each motor vehicle employed by it in such business * * * " It is not the instrumentality used in the business of interstate commerce—but the privilege of engaging in interstate commerce which is taxed.

Equally incompetent to the State was the compulsory insurance requirement of Section 79 Act No. 209 because this also is a burden upon interstate commerce. This section was considered by the lower court (p. 34 record, paragraph 1) as something beyond the permitted regulation of common carriers on the public highways and constituted an attempt by the state to unduly burden interstate commerce, and for that reason void, and it was so held by the lower court (opinion of lower court, Record p. 34).

PROPOSITION VII.

Section 3 of Act No. 209 of 1923 is Unconstitutional Because Too Vague and Uncertain to Furnish a Sufficiently Definite Standard of Guilt.

Section 3 of Act 209 (Record p. 4) provides that:

> "So far as applicable, all laws of this state now in force or hereafter enacted, regulating the transportation of persons or property by other common carriers, including regulation of rates, shall apply

with equal force and effect to such common carriers of persons and property by motor vehicle upon or over the public highways of this state as above provided."

There are on the statute books of Michigan a multitude of laws, many of them highly penal in their nature which, in the Commission's discretion may be made applicable to plaintiff. He cannot know how to regulate his conduct so as to avoid the penalties of these acts, for he does not and cannot know which of them are to be considered applicable to him. See

Kinnane vs. Detroit Creamery Co. 255 U. S. 102.

IX.

Comment on Cases in Appellant's Brief and Conclusion.

Some of the cases in appellants' brief have already been mentioned. Others will now be briefly discussed. Practically all of them deal with common carriers—to whom the public had to resort. Even in the *Pipe Line cases,* 234 U. S. 548 (discussed on pp. 16-17 of Appellants' brief) it appears from the argument of the Solicitor General for the United States (p. 550 of 234 U. S.) that no other means of transportation could possibly compete with pipe lines and that if a well owner could not ship by pipe line, he could not (practically) ship at all. And the Solicitor stated the object of the Act (Hepburn Act) to be: "to regulate interstate commerce in oil by protecting well owners and independent refiners from duress by pipe line owners* * *" (p. 550 of 234 U. S.). The plaintiff

in the case at bar occupied no such situation to the public. No one was compelled to resort to him. Shippers could use Intervenor's Street Railway or any of the numerous carriers by motor vehicle who held themselves out to the public as carrying generally for anyone who offered freight.

It is an issue in this case (if the appellants be not concluded by the position taken in the answer of the State in the lower court and the admissions made upon the argument for the temporary injunction) whether one who is not a common carrier in fact—may be embraced within Act 209 of 1923 of the State of Michigan.

It serves no useful purpose to multiply cases announcing the undisputed power of a state to regulate common carriers on the highways. No one disputes such generalities, as generalities, as are found in appellants' brief on this point. Such for example as the excerpt from an opinion (p. 12 appellants' brief) to the effect that:

> "We have repeatedly held that the legislature may regulate the use of the highways for carrying on business for private gain, and that such regulation is a valid exercise of the police power."

It seems to be considered that a State in its magic omnipotence over the subject of highways and common carriers, is in some mysterious way, in enacting law touching these subjects—especially highways—relieved of the necessity of any constitutional restraint—of the limitations that under our system of government both Federal and State—surround every piece of legislation. Certainly the state may regulate but it must do so in a constitutional manner,

—and the State of Michigan has not done so in Act No. 209 of 1923. That there may be a perfectly valid law passed regulating private carriers as well as common carriers is undisputed—that the approaching session of the Michigan legislature will do so is not improbable.

Even if it be assumed (which appellees do not admit) that Act No. 209 could declare private i. e. contract carriers to be common carriers and subject to the regulations and tax imposed by the act, yet the classification "for hire" still excludes and exempts a class, manufacturers and other large distributing corporations which uses the same highways commercially—in vehicles of the same kind exactly—of as great weight—doing the same damage to the roads—carrying the same kinds of freight (by automobile bodies)—and presenting the same problems of danger and traffic. The latter, however, are not within the act. Although within the reason and logic of the purpose of the act and its regulations they are, nevertheless, exempt. They pay no fee—they need apply for no permit. A and B come squarely within the reason of the law and its regulations. A must pay the tax—B is absolved. Whether the test be one of common sense or logic or the adjudicated cases on permissive classification—we arrive at the same result—namely that there is no fairness, justice, reasonableness or logic in the attempted classification. The act is void as an unreasonable and arbitrary classification of the persons and corporations who shall be subject to it. Its operation is not uniform.

At the hearing on the order to show cause why the temporary injunction should not issue, the state took the position before the court—(also in its answer and later in the brief filed below)—that the act was not applicable

to private carriers. The state police authorities and the Public Utilities Commission were however actively enforcing the act against the plaintiff applying for the injunction. It is likely that this situation influenced the exercise of the court in granting the temporary injunction. In view of this and in view finally of the constitutional aspect of the case, we submit that the order granting the injunction should stand and the judgment below be affirmed.

Percy J. Donovan,
Hal. H. Smith,
Attorneys for Plaintiff and Appellee.

MICHIGAN PUBLIC UTILITIES COMMISSION ET AL. *v.* DUKE, DOING BUSINESS AS DUKE CARTAGE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 283. Argued November 21, 1924.—Decided January 12, 1925.

1. A state law imposing upon all persons engaged in transportation for hire by motor vehicle over the public highways of the State the burdens and duties of common carriers, and requiring them to furnish indemnity bonds to secure payment of claims and liabilities resulting from injury to property carried, when applied to a private carrier without special franchise or power of eminent domain and engaged exclusively in hauling from a place within the State to a place in another State the goods of particular factories under standing contracts with their owners, violates the Commerce Clause, by taking from the carrier use of instruments by means of which he carries on interstate commerce, and by imposing on him

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[4] See the discussion of *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, by Thomas Reed Powell, 32 Harv. Law Rev. 251, 261–2.

unreasonable conditions precedent to his right to continue to carry on interstate commerce. P. 576.

2. To convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, by legislative fiat, is beyond the power of a State, since it would be taking property for public use without just compensation, in violation of the Due Process Clause of the Fourteenth Amendment. P. 577.

Affirmed.

APPEAL from a decree of the District Court granting an interlocutory injunction. See 294 Fed. 703.

Mr. H. E. Spalding, with whom *Mr. Andrew B. Dougherty*, Attorney General of the State of Michigan, *Mr. O. L. Smith* and *Mr. William L. Carpenter* were on the briefs, for appellants.

I. The Fourteenth Amendment is not violated by requiring all those using public highways in motor vehicle transportation for hire, including those who have previously done that business under private contract, to become common carriers.

A common carrier is not required to carry goods that he has not facilities to handle, or for which he has not space, nor is he required to carry goods of a class that he does not hold himself out to carry. He must, however, carry for all who offer, indifferently. This is the distinguishing characteristic of his business.

Highways are established for the use and convenience of the public. Their regulation and control is in the legislature or in those subordinate bodies, administrative or municipal, to which it has delegated the power of regulation. The legislature may impose any regulation or limitation upon the use of highways that might conceivably promote the public interest—anything not clearly arbitrary, anything that may facilitate traffic or make it safe, lessen the wear or prevent the destruction of the road bed, or relieve the public burden of construc-

tion and maintenance—is within legislative competence. It may limit the speed and weight of vehicles. It may prescribe types of vehicular construction. It may exclude traffic of certain kinds, or condition the use of highways in such traffic upon the payment of certain fees. See *Scovel* v. *Detroit*, 146 Mich. 93; *Commonwealth* v. *Kingsbury*, 199 Mass. 542; *Dobson* v. *Mascall*, 199 N. Y. Supp. 800; *People* v. *Rosenheimer*, 209 N. Y. 115; *Northern Pac. Ry. Co.* v. *Schoenfeldt*, 123 Wash. 579; *Hadfield* v. *Lundin*, 98 Wash. 657; *Ex parte Dickey*, 76 W. Va. 576; *Jersey City Gas Co.* v. *Dewight*, 29 N. J. Eq. 242; *Packard* v. *Banton*, 264 U. S. 140.

The principle that those who use the public highways as a place of business for private gain are exercising a privilege and not a right is as applicable to private as it is to public carriers.

To the same end, the protection of the public interest, the legislature may therefore require those who use the public highways in their private business of transportation for hire, to carry for the public at large as well as under private contract, and to be subject to regulation and control as common carriers.

The legislature cannot subject private property to public use without compensation, but may condition the use of public property—a public facility—in the transaction of a private business in such a manner as to insure the convenience and accommodation of the public.

It is therefore competent for the legislature to require those who at the passage of the Act are engaged or thereafter engage in motor vehicle transportation for hire on the public highways to do that business as common carriers. That is, without precluding them from carrying out such special contracts as they have made, it may compel them, if they continue in the business, to become common carriers and submit to the regulations which the Act imposes on such carriers. *Pipe Line Cases*, 234

U. S. 548. *Producers Transp. Co.* v. *Railroad Comm.*, 251 U. S. 228; *Louis. & Nash. R. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483; *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585, distinguished.

The lengths to which the regulation of business which does not involve the use of public property or service to the general public may be constitutionally carried is shown by the following: *Bross* v. *Stoeser*, 153 U. S. 391; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170.

II. The provisions of § 3 of the Act are within its title.

III. The remaining provision of § 3 subjecting carriers under the Act to all laws of the state regulating transportation by other common carriers so far as applicable is not invalid for indefiniteness.

IV. A State may require all carriers over its highways, including those engaged in interstate transportation, to protect their patrons by insurance or bond against injuries sustained in carriage upon the highways of the State. *Nashville, etc., Ry. Co.* v. *Alabama*, 128 U. S. 96; *Western Union Tel. Co.* v. *James*, 162 U. S. 650; *Chicago, etc., Ry. Co.* v. *Solan*, 169 U. S. 133.

Mr. Hal H. Smith and *Mr. Percy J. Donovan*, for appellee, submitted.

Mr. Justice Butler delivered the opinion of the Court.

This is an appeal under § 266, Judicial Code, from an order granting an interlocutory injunction restraining appellants from enforcing against appellee, plaintiff below, Act No. 209, Public Acts of 1923 of Michigan. The act provides that no person shall engage or continue

in the business of transporting persons or property by motor vehicle for hire upon the public highways of the State over fixed routes or between fixed termini, unless he shall have obtained from the Michigan Public Utilities Commission a permit so to do. The permit shall be issued in accordance with the public convenience and necessity, and may be withheld when it appears that the applicant is not able to furnish adequate, safe or convenient service to the public. §§ 1, 2. Section 3 provides that, "Any and all persons . . . engaged . . . in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state . . . shall be common carriers, and, so far as applicable, all laws of this state now in force or hereafter enacted, regulating . . . transportation . . . by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers . . . by motor vehicle . . ." Section 7 provides that, "Any and all common carriers under this act shall carry insurance for the protection of the . . . property carried by them in such amount as shall be ordered by said commission . . . or shall furnish an indemnity bond . . . conditioned upon the payment of all just claims and liabilities resulting from injury to . . . property carried by such carrier, and in a company authorized to do business in this state, in an amount to be fixed and approved by said commission." A rule adopted by the commission requires all common carriers, defined by the act, to take out such an indemnity bond; and the commission has announced that no permit will be given until there has been filed with it a certificate of the bonding company showing that such bond had been issued. The act imposes upon every such carrier a fee for the privilege of engaging in the business defined in § 1, and appropriates all fees to the general highway fund. And it prescribes punishment

by fine or imprisonment or both for violations of the act or of any lawful order, rule or regulation of the commission.

At the time of the passage of the act, plaintiff had three contracts to transport from Detroit, Michigan, to Toledo, Ohio, automobile bodies made at the plants of three manufacturers in Detroit and intended for the use of an automobile manufacturer at Toledo. He had been doing such hauling for some years, and had a large investment in property used exclusively for that purpose. He employed 75 men and operated 47 motor trucks and trailers upon the public highways of Michigan, which formed a part of the route between Detroit and Toledo. He had no other business and did not hold himself out as a carrier for the public. It was shown that defendants intended to enforce the act against him, and that, unless he obtained the permits required, they would cause his vehicles to be stopped on the highways by state police and local officers, and the prescribed penalties to be imposed upon him. Plaintiff alleged that the enforcement of the act would cause him irreparable injury, the loss of his contracts, the destruction of his business, and the loss of a substantial part of his capital investment. He assailed the act as invalid; and, among other things, averred that it contravenes the commerce clause of the Constitution of the United States; that it is repugnant to the due process clause of the Fourteenth Amendment, and that it violates the Constitution of Michigan, because it contains a plurality of objects, and its real object is not expressed in the title. The lower court held that § 7, providing for indemnity bonds imposes a direct burden on interstate commerce, and that the provisions of § 3 applicable to private carriers are foreign to the title of the act and fall under the condemnation of the state constitution. See opinion of the same judges in *Liberty*

Highway Co. v. *Michigan Public Utilities Commission*, 294 Fed. 703, 706, 708, decided the same day that the injunction was granted in this case.

Plaintiff is a private carrier. His sole business is interstate commerce, and it is limited to the transportation covered by his three contracts. He has no power of eminent domain or franchise under the State, and no greater right to use the highways than any other member of the body public. He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service, and has no right to call on him for transportation. The act leaves it to the commission to require plaintiff, if he is to use the highways, to be prepared to furnish adequate service to the public. It would make him a common carrier and subject him to all the duties and burdens of that calling and would require him to furnish bond for the protection of those for whom he hauls.

This Court has held that, in the absence of national legislation covering the subject, a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others; that a reasonable, graduated license fee imposed by a State on motor vehicles used in interstate commerce does not constitute a direct burden on interstate commerce, and that a State, which, at its own expense, furnishes special facilities for the use of those engaged in intrastate and interstate commerce may exact compensation therefor, and if the charges are reasonable and uniform, they constitute no burden on interstate commerce. *Hendrick* v. *Maryland*, 235 U. S. 610, 622; *Kane* v. *New Jersey*, 242 U. S. 160, 167. Such regulations are deemed to be reasonable and to affect

interstate commerce only incidentally and indirectly. But it is well settled that a State has no power to fetter the right to carry on interstate commerce within its borders by the imposition of conditions or regulations which are unnecessary and pass beyond the bounds of what is reasonable and suitable for the proper exercise of its powers in the field that belongs to it. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 201. One bound to furnish transportation to the public as a common carrier must serve all, up to the capacity of his facilities, without discrimination and for reasonable pay. The act would put on plaintiff the duty to use his trucks and other equipment as a common carrier in Michigan, and would prevent him from using them exclusively to perform his contracts. This is to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged as a private carrier and so directly to burden and interfere with it. See *Kansas City Southern Ry. Co.* v. *Kaw Valley District*, 233 U. S. 75, 78, 79; *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 334; *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142, 153. And it is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier, and the obligation of furnishing such indemnity bond to cover the automobile bodies hauled under his contracts as conditions precedent to his right to continue to carry them in interstate commerce. See *Adams Express Co.* v. *New York*, 232 U. S. 14, 33. Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways. The police power does not extend so far. It must be held that, if applied to plaintiff and his business, the act would violate the commerce clause of the Constitution.

Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the

business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, 230; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 535. On the facts above referred to, it is clear that, if enforced against him, the act would deprive plaintiff of his property in violation of that clause of the Constitution.

The Supreme Court of Michigan has not decided whether the act contravenes the state constitution; and as we hold that the enforcement of the act against plaintiff would deprive him of his rights under the Federal Constitution, and that therefore the decree must be affirmed, we do not pass on state questions. *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 204.

Decree affirmed.